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No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

GARY ANTOINE, et al.,

*Petitioners,*

v.

CALIFORNIA COASTAL COMMISSION,

*Respondent.*

**Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Six**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The questions presented for review refer to the following conditions imposed by the California Coastal Commission in a permit for a rock revetment seawall across 38 beachfront properties:

> (a) *Lateral Access Easement*: Each homeowner must offer to dedicate an easement for lateral public access and passive recreational use for the entire width of each homeowner's property seaward of the seawall, and
>
> (b) *Public Walkway Atop or Behind Seawall*: Each homeowner must construct and maintain in perpetuity at his/her expense and liability a public "pedestrian walkway at least ten feet in width at the crown of or behind the revetment [i.e., through each homeowner's private yard], with concrete staircases from the crown of the revetment to the beach".

1. Where such permit conditions are challenged as a taking, does *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), require greater judicial scrutiny than that afforded by the standard of review used by the Court of Appeal (i.e., "all evidence most favorable to the Commission must be accepted as true and that which is unfavorable discarded")?

2. By redefining the boundary between private property and public tidelands to a more landward position than under previous California case law, did the Court of Appeal sanction the Coastal Commission's physical invasion of private property for public use without compensation in violation of the Fifth Amendment by "the simple device" of a "sudden change in state law,

QUESTIONS PRESENTED FOR REVIEW – Continued

unpredictable in terms of relevant precedents," which Justice Stewart cautioned against in *Hughes v. Washington*, 389 U.S. 290, 296-7 (1967) (Stewart, J., concurring)?

3. Since the Commission explained that the walkway and lateral access easement conditions were justified by its speculative finding that the revetment *may* have been constructed *in some places* on public tidelands (as redefined), did the Court of Appeal err in holding that such a finding satisfied the *Nollan* nexus requirement and, further, that the walkway and lateral access easement requirements could be imposed on *all* homeowners and not simply on those few homeowners whose seawall allegedly was constructed on public tidelands?

4. Where an applicant for a land use permit satisfied the requirements to obtain the permit and the only credible evidence in the record showed that the project was constructed on private property, should the State have the burden of proof concerning the imposition of public walkway and access easements as conditions to the permit, or should the applicant have the burden of proof to show why such conditions should not be imposed?

5. In order to grant a meaningful remedy to the private property owner under the circumstances of this case, should unconstitutional public access conditions simply be stricken from the permit by the courts without remanding the matter back for further administrative proceedings (as this Court did in *Nollan*)?

## PARTIES TO THE PROCEEDING

PETITIONERS:

GARY ANTOINE, SUSAN G. BONEBAKKER, LEE BRONSON, DONA BRONSON, ROY P. CROCKER and JOSEPHINE S. CROCKER as Trustees of Trust A under the Restated and Amended Declaration of Trust dtd 5/11/73, ANNE P. DRASDO, RUDOLPH J. EICHLER and DOROTHEA R. EICHLER, Trustees of RUDOLPH J. EICHLER Family Trust dtd 2/6/67, CAROLYN P. ROWAN and JOHN B. KEITH as Trustees under Declaration of Trust dtd 8/21/62, DOROTHY P. FLYNN, FRANCES W. GALE, CHARLES A. GRAHAM, MARILYN H. GRAHAM, ROBERT HOFFMAN HEARTT, LOUISE WEISEL HEARTT, and TIMOTHY ROBERT HEARTT as Trustees of the ROBERT HOFFMAN and LOUISE WEISEL HEARTT 1975 Trusts dtd 4/22/75, PHILIP R. HECKENDORN, ENCARNACION NITA PUIG HECKENDORN, PATRICIA WIMAN HEWITT as Trustees U/T/A dtd 11/8/69, SELINA I. MCKINLEY, CATHERINE A. MILLAR, RICHARD R. MILLAR, PARKER G. MONTGOMERY, MARY E. MORTON, Estate of DOROTHY P. MUDD, CAROLINE I. NORMAN, CHARLES R. NORMAN, KELTON NORMAN, FRANCIS L. NORMAN'S NURSERY, INC., a California corporation, JOHN C. OXLEY, DOROTHY E. PATTEE, THE CATE SCHOOL, EUGENE F. REID, MARJORIE E. REID, FRANK A. SERENA, LORRAINE SERENA, LANSCO PROPERTIES, SCOTT K. SMIGEL, DANA C. SMITH, Estate of ALBERT STURGESS, MOLLY A. STURGESS, MARGARET C. TAYLOR, RUTH THORNBURGH, ELEANOR S. TILT, JUDY K. TOMPKINS, MARION F. TOMS, RONALD N. WHITE, HELAYNE C. WHITE, JOHN R. WILSON, BARBARA Z. WILSON, MARJORIE G. WILSON, RUTH VON PLATEN, and SANDYLAND COVE HOMES ASSOCIATION, LTD.,

**PARTIES TO THE PROCEEDING** – Continued

RESPONDENT:

CALIFORNIA COASTAL COMMISSION

AMICUS CURIAE:

PACIFIC LEGAL FOUNDATION
CALIFORNIA STATE LANDS COMMISSION

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## PETITION FOR WRIT OF CERTIORARI

### DECISIONS BELOW

The decision of the California Court of Appeal, Second Appellate District, Division Six, filed July 31, 1992, is reproduced as Appendix ("App.") A. The Court of Appeal's order modifying this decision and denying petitioners' petition for rehearing, filed August 26, 1992, is reproduced as App. B. The California Supreme Court's order denying petitioners' petition for review is reproduced as App. C. The California Superior Court's Statement of Decision is reproduced as App. D. The California Coastal Commission's Revised Findings are reproduced as App. E. The Commission's denial of petitioners'

request for reconsideration, in the form of minutes, is reproduced as App. F.

## JURISDICTION

On July 31, 1992, the California Court of Appeal, Second Appellate District, Division Six, entered its decision reversing a favorable judgment for petitioners in the Superior Court. App. A. Petitioners' petition for rehearing was denied. App. B. On October 29, 1992, the California Supreme Court denied petitioners' petition for review, at which time the proceeding became final in the California courts. App. C. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS, STATUTES AND LOCAL COASTAL PLAN POLICIES AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

California *Civil Code* Section 830 provides:

> "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is

> no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

California *Public Resources Code* Section 30235, a provision of the California Coastal Act, provides:

> "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and such other construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger of erosion and when designed to eliminate or mitigate adverse impacts on shoreline sand supply."

Policy 3-2 of the Santa Barbara County Local Coastal Plan provides:

> "Revetments, groins, cliff retaining walls, pipelines and outfalls, and such other construction that may alter natural shoreline processes shall be permitted when designed to eliminate or mitigate adverse impacts on local shoreline sand supply and so as not to block lateral beach access."

## STATEMENT OF THE CASE

The same California Court of Appeal, Second Appellate District, Division Six, which was overruled by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), now has upheld walkway and public access conditions to a coastal development permit which are substantially more onerous than those invalidated in *Nollan*. The Court of Appeal found the *Nollan* decision to be largely inapplicable to the issues of this case.

Petitioners are (a) the individual owners of 38 homes in Sandyland Cove (immediately north of the City of Carpinteria, California) and (b) the Sandyland Cove Homes Association.

1. *Background: Sandyland Cove.* When the homes in Sandyland Cove were built (many date back to the 1930's), the beach was quite wide and provided ample protection from heavy surf during winter storms.

After construction of the Santa Barbara Harbor in the 1930's, downcoast beaches, including the Sandyland Cove beach, became narrower as a result of the Harbor's effect on longshore sand transport processes.[1] See Bailard & Jenkins, *Beach Erosion and Pier Study* (prepared for the City of Carpinteria; April 1982). The Beach Erosion and Pier Study ("Bailard Report") was introduced into the administrative record before the Coastal Commission, and was pages 193-493 of the Joint Appendix on Appeal ("J.A.").

In 1958, petitioners built a rock revetment to protect against damage from heavy surf during winter storms.

In the 1960's and 1970's and through 1982, the Sandyland Cove beach was generally stable in width, subject to

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[1] The Harbor interrupted natural longshore sand transport processes, trapping sand that otherwise would have traveled in a littoral drift along the coastline from north to south. When the Harbor was not dredged for extended periods prior to 1960, this "starved" downcoast beaches, including the Sandyland Cove beach, of sand. Over two million cubic yards of sand accumulated in, or on beaches upcoast of, the Harbor. Bailard Report, J.A. at 289-299. However, after 1960, due to an ongoing dredging program at the Harbor in which dredged sand is deposited on downcoast beaches, "the net sand accumulation [at the Harbor] has been quite small, amounting to only 200,000 cubic yards." Bailard Report, J.A. at 299.

some variation over the years but primarily to seasonal variation.[2] See Bailard Report, J.A. at 301-306.

Due to onshore-offshore sand transport processes, the Sandyland Cove beach is widest in summer and narrowest in winter. Heavy surf during winter storms transports sand offshore. This sand transfer is reversed by summer wave conditions and the beach face is built up each summer. Bailard Report, J.A. at 281, 285.

The average seasonal variation in beach width in the Carpinteria area, including the Sandyland Cove beach, was 68 feet in the ten years prior to 1982. Bailard Report, J.A. at 309.

The "El Nino" winter storms of 1983 decimated beaches along the entire Santa Barbara County coastline. The then-existing Sandyland Cove seawall was partially destroyed, and there was flooding around the homes in Sandyland Cove. The Sandyland Cove beach, like all area

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[2] As noted in the Bailard Report, each beach is subject to somewhat different onshore-offshore sand transport processes due to such differences as wave energy during storms resulting from beach orientation or offshore reefs affecting wave action. However, the most important factor in long-term changes in beach width is the amount of sand trapped by the Harbor and thereby removed from the littoral drift. "To the casual observer, [the] on-offshore sediment transfer is quite evident. The longshore sediment transfer is much less visible; however, it is responsible for long-term changes in beach width." Bailard Report, J.A. at 285. Therefore, it is not surprising that after 1960 the Sandyland Cove beach width generally has been stable (when winter beaches are compared to winter beaches and summer beaches are compared to summer beaches) since the amount of sand dredged from the Harbor and deposited on downcoast beaches (from which it drifts downcoast to Sandyland Cove) essentially equalled the amount of sand trapped by the Harbor.

beaches, was significantly narrowed for several years thereafter due to the storm-caused sand loss, until natural processes restored the beach to its prior (and present) condition.

2. *County Permit For Seawall.* Following the winter storms in early 1983, petitioners applied to the County of Santa Barbara for an emergency permit to construct improvements to the damaged rock revetment since further heavy storms were forecast for the next winter. The emergency permit was granted on September 16, 1983. The improvements to the revetment were constructed in October 1983. The landward portion of the revetment backs up to the low bluff on which petitioners' homes are located, and covers and incorporates the prior seawall.

While the emergency permit was being processed, petitioners also proceeded with the regular permit procedure, including environmental review under the California Environmental Quality Act. On September 22, 1983, the County adopted a Negative Declaration concluding that the seawall would not cause any significant adverse environmental effects and that the riprap rock design mitigated potential impacts on shoreline sand transport. J.A. at 136-142. On December 14, 1983, the Planning Commission approved a permit for the seawall, subject to the condition that each of the petitioners offer to dedicate a lateral access easement along the beach for public use seaward of the toe of the seawall.

Petitioners appealed the access requirement to the County Board of Supervisors, which removed the lateral access easement condition from the permit. J.A. at 155-156.

No representative of the Coastal Commission or member of the public appeared at any of the hearings

conducted by the County, or submitted any comments to the County or otherwise expressed any opposition to the seawall.

3. *Coastal Commission Proceedings and Decision.* After the County issued the coastal development permit for the revetment, the Chairman and Vice Chairman of the Coastal Commission ("Commission") appealed its issuance on the ground that "[t]he project was approved without a requirement for lateral access as required by the County's Certified Local Coastal Plan." J.A. at 168.

After the Commission heard the appeal, it reimposed the lateral access easement deleted by the Board of Supervisors, and, *in addition*, imposed a requirement that petitioners construct a public walkway atop or behind the seawall (i.e., through petitioners' backyards) and maintain it in perpetuity at their liability and expense. See Special Conditions 1(a), 1(b), 1(c) and 2, in App. E at E-3 through E-5.

Throughout the Commission proceedings, the Commission staff and a majority of the Commission insisted that public access was mandatory and that petitioners must comply with this absolute requirement. See App. E.

The *essential* objection of the Coastal Commission to the seawall was that the toe of the improved seawall was seaward of the toe of the previously existing seawall. Therefore, in the Commission's view, "the [seawall] will reduce and block existing lateral beach access" (App. E., at E-9), which justified *both* the walkway and lateral access easement conditions:

> "The conditions of approval require the applicant to provide a trail along the [seawall] and staircases to the beach. The trail and staircase would replace existing beachfront access blocked by the [seawall] and permit continuous

> public access along the shoreline. . . . [If] the new revetment's seaward toe [was] coterminous with the existing seawall, it would not block existing access along the beach." App. E, at E-13.
>
> "Because the revetment will encroach seaward of the toe of the old revetment, it is not excluded from the Coastal Act's access dedication requirement. For this reason, the conditions of permit approval require an offer of dedication for public access along the beach seaward of the new revetment. Dedication of this easement is necessary to balance the project's adverse effects on public access with the benefits provided to the applicant. The project's adverse effects on public access have been described above." App. E., at E-26.

The only survey available at the time of the hearing was the mean high tide line[3] drawn by the State Lands Commission in 1964. As shown on the plans, the seawall was substantially landward of the 1964 line and located on petitioners' private property. J.A. at 38-42. The Commission disregarded the 1964 survey and the Bailard Report, which (as discussed above) demonstrated that the width of the Sandyland Cove beach from the 1960s through 1982 generally had been stable.

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[3] California *Civil Code* § 830 defines the boundary between State lands and private lands when the private lands "border on tidewater" as "the ordinary high water mark", which is commonly referred to as the mean high tide line.

Instead, the Commission interpreted the mean high tide line as a continuously moving boundary[4] and gave primary consideration to the winter high tide position after the El Nino storms. Based on this interpretation of the tidelands boundary and the Commission's mischaracterization of the seaward extent of the new revetment,[5] the Commission speculated that the seawall "*may* have been constructed *at least partially* on State tidelands." App. E., at E-10 (emphasis added).

Petitioners objected throughout the proceedings to the imposition of the walkway and lateral access easement conditions, and exhausted their administrative remedies. App. F., at F-1 and F-2 (request for reconsideration denied).

4. *Petition for Writ of Mandate.* In their petition for writ of mandate, petitioners alleged that the walkway and lateral access easement conditions should be stricken by the court from the permit for the revetment on a variety of grounds, including:

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[4] As discussed below, the Commission's interpretation ignores the average position of the beach and the proper location of the mean high tide line under prior California case law, and thereby greatly expands "public tidelands" landward.

[5] While the new wall is somewhat seaward of the old wall in some places, the Commission consistently mischaracterized the seaward extent of the new seawall as twelve to sixteen feet beyond the toe of the old seawall, based on its misreading of the plans. See, e.g., App. E., at E-9. The County's Negative Declaration stated that there would be "encroachment seaward 2-5 feet at some places and retreat landward at a few places of the wall." J.A. at 139. The Commission simply dismissed the Negative Declaration as erroneous, based on its misreading of the plans. App. E., at E-11.

> "27. The decision of the Coastal Commission in regard to this project is arbitrary and unreasonable, for reasons which include, but are not limited to, the following:
>
> . . .
>
> c. The conditions imposed on the permit result in an unconstitutional taking of petitioners' property for a public purpose without the payment of compensation.
>
> d. The conditions bear no reasonable relation to the nature of the project.
>
> e. The conditions are not supported by the findings."

5. *Arguments of the Parties in the Trial Court.* In the Superior Court, petitioners argued that *Nollan* required considerable judicial scrutiny of evidence and findings supporting the walkway and lateral access easements, and that a more deferential standard of review (the substantial evidence test) was not applicable. J.A. at 1239-1240, 1479-1480. Petitioners argued that the ownership of and right to protect private property from damage are fundamental rights under both federal and state constitutions.[6]

Petitioners further argued that the walkway and lateral access easement conditions violated the Fifth Amendment prohibition on taking of private property for public use without just compensation, citing and discussing *Nollan* at length. Petitioners argued that the walkway and lateral access easement conditions imposed on them was far more burdensome than the lateral access easement condition

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[6] Petitioners argued that the right of private property owners to take defensive measures against ocean flood waters has long been recognized under a common law doctrine, the Common Enemy Rule, expressly approved by California courts. *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 P. 625 (1887); *Katenkemp v. Union Realty Co.*, 6 Cal. 2d 765, 774, 59 P.2d 473 (1940).

imposed on the Nollans and invalidated by this Court, especially since petitioners merely sought to protect their existing homes and the Nollans had built a new home. J.A. at 1241-1249, 1283-1287, 1467-1479, and 1482-1488.

Petitioners also argued that California *Public Resources Code* § 30235 and Santa Barbara County Coastal Plan Policy 3-2 specifically allowed for the construction of seawalls necessary to protect existing structures and that the requirements of Section 30235 and Policy 3-2 were satisfied. In particular, the riprap rock design mitigated potential adverse impacts on local shoreline sand supply and did *not* block public access because the seawall did not encroach on tidelands. J.A. at 1251, 1254-1257, 1495-1498.

Petitioners also argued that the court should strike the unconstitutional walkway and lateral access conditions from the permit for the seawall without remanding the matter for further proceedings before the Commission. J.A. at 1270-1272.

The Commission attempted to construe its actions as consistent with *Nollan,* and acknowledged that its walkway condition was supported solely by its "finding" that the seawall "may have been constructed at least partially on State tidelands." The Commission argued that the ordinary high water mark should be determined by reference to the winter high tide line (citing a Florida case). The Commission argued that the substantial evidence test was applicable and that there was substantial evidence to support its decision.

Petitioners responded that, under *People v. Wm. Kent Estate,* 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1966), the ordinary high water mark should be determined as the average of all mean high tide positions along the shore over a period of years, not as a winter high tide line.

6. *Trial Court Ruling.* After trial, on May 14, 1990, Superior Court Judge William Gordon ruled that the Commission's "finding" that the seawall "may have been constructed at least partially on State tidelands" was "more on the order of speculation than a finding," but "assuming it qualifies as a finding, there is no substantial evidence to support it":

> "[The Coastal Commission] took no evidence regarding location of the [ordinary] high water mark. It did nothing more than dismiss as outdated a State Lands Commission survey of 1964, which showed the ordinary high water mark substantially seaward of the location of the seawall. The 'pragmatic evidence' to which [the Coastal Commission] refers in its points and authorities relates only to observed conditions during an extremely limited period of time and falls far short of the kind of substantial evidence which would support a reasonably accurate finding as to the ordinary high water mark." App. D, at D-9.

The Superior Court declined to rule on the lateral access easement and many other issues, and ordered that a writ of mandate issue remanding the entire matter to the Commission for further proceedings. Particular emphasis was placed on the need to locate the ordinary high water mark (mean high tide line) in accordance with *People v. Wm. Kent Estate.* App. D, at D-9.

7. *Arguments of Parties and Amicus Curiae on Appeal.* In the Court of Appeal, both petitioners and the Commission essentially repeated the arguments they each had made in the trial court, as summarized above. Petitioners emphasized that heightened scrutiny was applicable (citing *Nollan* and *Surfside Colony Ltd. v. California Coastal Commission,* 226 Cal. App. 3d 1260, 277 Cal. Rptr. 37 (1991)), that there was no credible evidence that the seawall was constructed except on private property, and therefore that the access conditions were unconstitutional. The Pacific Legal Foundation filed a brief amicus curiae in support of petitioners.

The State Land Commission filed a brief amicus curiae in support of the Commission, which acknowledged:

> "The only reported California case to specifically discuss [the] issue [of seasonal movements of the shoreline back and forth in determining the tidelands boundary] was *People v. Wm. Kent Estate* . . . The Court, in *Kent*, favored rejection of a continuously moving boundary line, believing that a moving line was impractical to use for legal boundary purposes." State Lands Commission Brief, at 23.

The State Lands Commission argued that the Court of Appeal should adopt the "most landward mean high tide line" to determine the ordinary high water mark, by which it meant the line of mean high tide against the "normal landward beach profile" (i.e., the winter shoreline):

> *"Using the normal landward beach profile to determine the tidelands boundary would provide a marginal strip of beach, or zone of flux, between the normal 'winter' and 'summer' locations of the line of mean high tide, which may be used by the public for beach access and recreation.* . . . This zone . . . on many beaches can be from 30 to more than 100 feet wide. Such areas, while normally wet in the winter, provide the public with dry sand beach to utilize during the summer and during other times of the year. . . . The State Lands Commission respectfully urges this Court to adopt this line as the tideland boundary to be used in deciding this appeal." State Lands Commission Brief at 34-35 (emphasis added).

In response, petitioners argued that the effect of the State Lands Commission's arguments in favor of a "zone of flux" was to adopt the "continuously moving boundary" rejected in *People v. Wm. Kent Estate* – resulting in a

taking of private property. See Cross-Appellants' Reply Brief and Response to Brief of Amicus Curiae, State Lands Commission, at 17-21.

8. *Court of Appeal Decision.* The Court of Appeal adopted a "moving boundary" concept to define mean high tide line. App. A, at A-15 through A-21.

The Court of Appeal also ruled that the applicable standard of review is the "substantial evidence rule," which it articulated as follows: "All evidence favorable to the Commission's finding must be accepted as true, and that which is unfavorable discarded as not having sufficient verity to be accepted by the trier of fact." App. A, at A-14.

The Court of Appeal stated that the substantial evidence rule was applicable because "a property owner [has] no fundamental vested right to construct a revetment in the coastal zone without a permit," citing its own decision in *Whaler's Village Club v. California Coastal Commission,* 173 Cal. App. 3d 240, 251-254, 218 Cal. Rptr. 122 (1985). In response to petitioner's arguments that *Whaler's Village* and similar cases were no longer valid after *Nollan,* the Court of Appeal found *Nollan* inapplicable to the issues of this case. App. A, at A-7 through A-9.

The Court of Appeal expressly placed the burden of proof on Sandyland Cove as to each and every issue and condition imposed by the Commission related to its seawall application. App. A, at A-11 through A-13. The Court of Appeal stated: "To the extent *Surfside* can be read as holding the burden is on the Commission to prove that the seawall was built on public property or otherwise burdens public access, we decline to follow it." App. A, at A-13.

As to the walkway and lateral access easements, the Court of Appeal held:

> "Sandyland contends the trial court erred in not declaring the walkway condition to be unconstitutional. The contention is based on the theory that Sandyland has shown the seawall to have been built entirely on its own land. Where, as here, an applicant for a seawall permit has failed to carry its burden of showing the seawall will not encroach on state tidelands, we see nothing unconstitutional about either denying the application or granting it on condition that the public have a walkway on top of the seawall.
>
> "Similarly, Sandyland's failure to carry its burden of showing the seawall will not encroach on state tidelands will support a condition requiring an offer to dedicate an easement for lateral access from the toe of the seawall seaward, even though it might be said that such an offer to dedicate is superfluous." App. A, at A-21, A-22.

The Court of Appeal remanded the matter for further proceedings on the ground that it was only fair to allow petitioners an opportunity to submit additional evidence because the burden of proof was being placed on it. App. A, at A-15, A-16.

9. *Petition for Hearing in California Supreme Court.* Among the issues presented for review in petitioners' petition for hearing in the California Supreme Court were the following: (1) whether a governmental agency should have the burden of proof concerning public walkway and access easements across private property imposed as permit conditions, or the permit applicant should have the burden of proof as to why public walkway and access easements across his/her private property should not be

imposed as a permit condition (the essence of the holding of the Court of Appeal in this case); (2) whether the substantial evidence rule or heightened scrutiny was applicable in a takings challenge to walkway and public access easement conditions imposed as permit conditions; (3) whether the Court of Appeal erred in not declaring the walkway and lateral access easement conditions to be unconstitutional, not supported by findings and not supported by evidence; and (4) whether the walkway and lateral access easement conditions simply should be stricken from the permit for the revetment without remanding the matter back to the Commission for further administrative proceedings.

In discussing these issues, petitioners argued, among other things, that:

> "The Court of Appeal's decision not to employ heightened scrutiny (or not to require a substantial relationship), as set forth in *Nollan v. California Coastal Commission* and *Surfside Colony*, combined with the Court's decision to impose the burden of proof on [petitioners] as to public access conditions imposed by the Commission, undermines and eviscerates the protections of the State and Federal Constitutions prohibiting the taking of the private property for public purposes without payment of just compensation. . . .
>
> "By ignoring average beach position and referring to the narrowest beach position for purposes of determining the ordinary high water mark, the Coastal Commission and State Lands Commission seek to greatly expand their jurisdiction and powers. The effect is to take what was formerly private property for public use without compensation in violation of the State and Federal Constitutions. . . .

"[Petitioners submit] that is a case such as this case, where the applicant has satisfied the express requirements of the governing statutes, the burden of proof as to public access conditions imposed by the Commission on the private property owners is properly placed on the Commission. This is particularly true where the State has the power to determine the location of the ordinary high water mark through proceedings of the State Lands commission and has not done so!" Petition for Hearing, at 19-20, 26-27.

## REASONS FOR GRANTING WRIT

### I

### THE PETITION SHOULD BE GRANTED TO ALLOW THE COURT TO REVIEW AND FURTHER RULE ON THE DEGREE OF JUDICIAL SCRUTINY APPLICABLE IN TAKINGS/EXACTIONS CASES

#### A. The Court of Appeal Ruling Conflicts with This Court's *Nollan* Decision and Other State Court Decisions Following *Nollan*

In *Nollan*, this Court ruled that the condition for the abridgment of property rights is that the regulation or exaction in question must *substantially* advance legitimate state interests. Otherwise, the regulation or exaction is invalid because it effects a taking of private property for public use without the payment of just compensation. *Nollan*, 483 U.S. at 834, 841. "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'" Id. at 837 (quoting *J.E.D. Assocs. Inc. v. Atkinson*, 121 N.H. 581, 584).

In evaluating whether an exaction substantially advances legitimate state interests and substantially advances the same state interest that would otherwise be impeded by the proposed development, the Court stated that it is *"inclined to be particularly careful"* where the actual conveyance of property is made a condition of a land use permit "since in that context there is *heightened risk* that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." Id. at 841 (emphasis added).

The Court made clear that a greater degree of scrutiny is applicable in a takings analysis than the "rational basis" test applicable in due process and equal protection challenges. Id. at 834, note 3. Legal commentators have recognized that *Nollan* sets forth a "heightened scrutiny" standard of review, and have discussed at length the significance of this aspect of *Nollan*. See, e.g., Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 Neb. L. Rev. 186, 210 (1991) ("[i]t was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis . . . that marks the importance of the *Nollan* case"); Robert K. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 Zoning & Planning L. Report 152, 156 (Oct. 1987).

State courts have articulated the greater degree of scrutiny required by *Nollan* as "heightened scrutiny" or a "substantial relationship test." See *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y. 1989) (challenges of this sort require "'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships' as articulated in *Nollan*"); *Surfside Colony, Ltd. v. California*

*Coastal Commission, supra,* 226 Cal. App. 3d at 1270 ("*Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls") (emphasis in original; footnotes omitted).

In *Nollan*, this court examined the findings *and* evidence which the Commission asserted justified imposition of a lateral access easement condition on the coastal development permit for the Nollans' enlarged beachfront home. The Court scrutinized the "visual impairment" finding of the Commission and held that the lateral access easement condition did not mitigate blockage of ocean views from the adjacent highway caused by the new house. Id. at 841.

The Court *also* reviewed the evidence in the administrative record concerning an allegedly constantly shifting mean high tide line on the Nollans' beach, and rejected the Commission's arguments based on such evidence. Such evidence and the Commission's findings were described in detail in Justice Brennan's dissenting opinion. Id. at 850-853 (Brennan, J. dissenting). In the underlying administrative proceedings in *Nollan*, the Commission had speculated that the mean high tide line "*appeared* to be located either on or behind the existing seawall." Commission's Report, quoted at 483 U.S. at 851 (emphasis added). The Commission argued that this "finding" justified the lateral access easement condition, which would create a sort of "buffer zone" to avoid boundary disputes and assure public access along the shoreline. The Court clearly reviewed and rejected both the evidence, the

finding, and the suggestion of the utility of a "buffer zone".[7] Id. at 839, note 6.

The Court of Appeal decision in this case places itself directly at odds with *Nollan* and with judicial interpretations of *Nollan*. The Court of Appeals rejects any suggestion that heightened scrutiny is applicable. It applies California's substantial evidence rule, which takes into consideration only evidence supporting the administrative decision. In contrast, in *Nollan*, this Court scrutinized the evidence and rejected findings as unsupported by the evidence, as discussed above. Petitioners note that, in *Nollan*, the evidence was more substantial than the very limited observations which are the basis of the Commission's speculative finding about the tidelands boundary in this case. In addition, in this case, the only credible evidence in the administrative record establishes that the Sandyland Cove revetment was built on private property.

This Court should grant a writ of certiorari because the Court of Appeal's decision in this case conflicts with the *Nollan* decision and with state court decisions following *Nollan* and applying "heightened scrutiny".

### B. The Heightened Scrutiny Issue Is an Important Question of Law Which Should Be Resolved by This Court

The lower courts must apply the correct degree of scrutiny if they are to properly conduct a takings analysis under *Nollan*. Indeed, the level of scrutiny is the key

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[7] The "buffer zone" advocated by the Commission in *Nollan* is the same beach area the State Lands Commission described as a "zone of flux" in its brief amicus curiae in the Court of Appeal – and which the Court of Appeal created when it adopted a moving boundary definition of the ordinary high water mark.

factor in determining whether the Takings Clause provides protection to property owners from government exaction schemes. This is aptly illustrated by the decision below where application of California's substantial evidence rule easily led to a decision upholding the walkway and lateral access easement exactions.

The Court in *Nollan* characterized the Commission's abuse of its permitting authority as extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. How are courts to ferret out such abuses of the permitting authority if they do not look closely at the findings *and* evidence underlying the governmental action? The present case, like *Nollan*, illustrates the need for heightened judicial scrutiny. Resolving the issue of the appropriate degree of scrutiny under the Takings Clause, created by the Court of Appeal's decision in this case, merits review by this Court.

In the absence of a writ of certiorari in this case, Justice Brennan's prediction that "the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access" will prove to be prescient. Id. at 862 (Brennan, J., dissenting). The Court disagree with Justice Brennan, stating that "compliance with [the Fifth Amendment's Property Clause is] more than an exercise in cleverness and imagination." Id. at 841. However, if courts employ a deferential standard of review such as the substantial evidence rule in takings/exactions analyses, cleverness and imagination are all that will be required for agencies to comply with the Property Clause.

II

**BY A SUDDEN CHANGE IN STATE LAW REDEFINING THE PUBLIC-PRIVATE BOUNDARY ALONG THE SHORELINE, THE COURT OF APPEAL'S DECISION SANCTIONS A PHYSICAL INVASION OF PRIVATE PROPERTY WITHOUT COMPENSATION. THESE CIRCUMSTANCES, WHICH JUSTICE STEWART CAUTIONED AGAINST IN *HUGHES V. WASHINGTON*, PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.**

In California, the State Lands Commission has jurisdiction over state lands and among its duties and powers is the establishment of the tidelands boundary along the shoreline. The Commission has no such authority.

General principles concerning tidelands are not in dispute. As stated in *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 502-503, 505, 188 Cal. Rptr. 191 (1982): (1) the tidelands along the beach are the lands between the lines of mean high tide line and mean low tide, citing *Marks v. Whitney*, 6 Cal. 3d 251, 257-258, 98 Cal. Rptr. 790, 491 P.2d 374 (1971); and (2) the seaward boundary of the upland property owner is the "mean high tide line," citing California *Civil Code* § 830 and *People v. Wm. Kent Estate, supra.*

As the State Lands Commission acknowledged, the only reported California case discussing the tidelands boundary on beaches affected by seasonal variation in the width of the beach is *People v. Wm. Kent Estate, supra.* The *Kent Estate* Court, construing California *Civil Code* § 830, held:

> "It is apparent that the term 'ordinary high tide,' and 'mean high tide,' as used in the cases and statutes, refer to an average over a long period, expressed in terms of height or elevation of the

> plane of water. Obviously, since it does represent an average, it is a fixed figure. It does not vary, fluctuate or migrate save over a long period of time and even then probably in but minute degree . . .
>
> Of course, reference to ordinary high water as a boundary or 'mark' necessarily refers to the point at which the plane of average high tide meets the land . . . To the extent that the land itself moves, as is the case of the sandy beach here in issue, this line does vary.
>
> The evidence, however, does not support the finding that 'from time to time' the boundary 'migrates landward due to natural erosion and seaward due to natural accretion,' thus constantly transferring ownership of the intermediate land . . . [A]ddition to the land is accretion (and loss of land is deliction) only when the changes are gradual and imperceptible. . . . The evidence here is that the beach is some eighty feet wider in summer than in winter. If these changes be constant, in offsetting pairs occurring annually, they can hardly be gradual and imperceptible, and thus cannot meet the definition of natural accretion and deliction.
>
> No effort was made by the parties to determine whether these movements are of substantially the same distance each year, thus affording a basis for fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line. This effort should be made upon retrial." 242 Cal. App. 2d at 160, 161.

Thus, the *Kent Estate* Court rejected a continuously moving boundary line, and held that the ordinary high water mark is and should be a stable boundary based on average high tide and average shore position. The *Kent*

*Estate* Court's approach allows natural processes causing seasonal variations in the beach to offset one another, without changing the public-private boundary.

The Commission's adoption of a continuously moving line and reference to beach conditions shortly following the devastating El Niño storms represents a very significant departure from the method of determination of the tidelands boundary set forth in *People v. Wm. Kent Estate.* What was petitioners' private property, suddenly, was converted by the Commission into public land by the simple device of the Commission and the Court of Appeal redefining the tidelands boundary landward.

Petitioners submit that the Commission and Court of Appeal's action is a physical invasion of its private property without payment of compensation, and is prohibited by the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

In *Hughes v. Washington,* 389 U.S. 290 (1967), the Court reversed a judgment of the Supreme Court of Washington involving the application of federal law in defining the rights of a beach front property owner who traced her title to a federal grant prior to statehood. Justice Stewart concurred in the reversal of the judgment, and cautioned against "sudden change[s] in state law, unpredictable in terms of the relevant precedents" (389 U.S. at 296) which can give rise to a taking in circumstances such as Mrs. Hughes found herself:

> "[A] State cannot be permitted to defeat the constitutional prohibition against taking property . . . by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked

> an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court . . .
>
> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course, the court did not conceive of this action as a taking. . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the [lands at issue] by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so . . . [T]he Due Process Clause forbids such confiscation by a State, no less through its courts than through its legislature." *Id.* at 296-298 (Stewart, J., concurring) (emphasis in original).

This case presents the Court with the same type of taking identified by Justice Stewart in *Hughes v. Washington*. As such, this case presents an important question of federal law which has not been, but should be, settled by this Court.

## III

## THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE NEXUS REQUIREMENT ARTICULATED IN *NOLLAN*

The Commission explained that the walkway and lateral access easements conditions were justified by the Commission's "finding" that the revetment *may* have been constructed in some places on public tidelands (as

the Commission defined the tidelands). Petitioners submit that such a finding is not a legally sufficient nexus: speculation simply is inadequate to support the actual conveyance of property as a condition to a land use permit under *Nollan*. As such, the Court of Appeal's decision is in conflict with *Nollan*.

Further, the walkway and lateral access easement requirements were imposed by the Commission on *all* homeowners and not simply on those few homeowners whose seawall allegedly was constructed on public tidelands. *Even assuming* that the speculative finding of the Commission could justify a walkway and lateral access easement requirement for those few homeowners whose seawall allegedly was constructed on public tidelands, such a finding absolutely cannot justify a walkway and lateral access easement across real properties in which even the Commission does not assert that the seawall was constructed on public tidelands.

Thus, the Court of Appeal has decided a federal question in a way that conflicts with this Court's *Nollan* decision, and this petition for writ of certiorari should be granted.

## IV

## WHETHER THE GOVERNMENTAL AGENCY OR THE PRIVATE PROPERTY OWNER HAS THE BURDEN OF PROOF AS TO PUBLIC WALKWAY AND ACCESS EASEMENT CONDITIONS TO A LAND USE PERMIT IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The essential legal and practical effect of the Court of Appeal's decision in this case is to place on private property owners the burden of proof as to why a public

walkway and access easement across private property should not be imposed as a condition to obtaining a land use permit. Petitioners submit that this question, whether the governmental agency should have the burden of proof concerning walkway and access easements imposed as permit conditions or whether the permit applicant should have the burden of proof to show why such conditions should not be imposed, is an important federal question.

The *Nollan* decision does not discuss the burden of proof in so many words, but clearly implies that the burden of proof is on the governmental agency – especially where the actual conveyance of property is made a condition of a land use permit "since in that context there is heightened risk that the purpose of [the condition] is avoidance of the compensation requirement, rather than the stated police power objective." Id. at 841.

However, the Court of Appeal below did not understand or construe *Nollan* in the manner petitioners believe the Court intended its decision to be construed and applied. Either the Court of Appeal decision is in conflict with *Nollan,* or an important question of federal law has not been, but should be settled, by this Court.

## V

## WHEN ADMINISTRATIVE AGENCIES REQUIRE UNCONSTITUTIONAL EXACTIONS AS CONDITIONS TO LAND USE PERMITS, THE ISSUE OF THE APPROPRIATE REMEDY IN SUCH CIRCUMSTANCES PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT. IN GENERAL, COURTS SHOULD STRIKE SUCH UNCONSTITUTIONAL EXACTIONS FROM THE PERMIT WITHOUT REMANDING THE MATTER BACK FOR FURTHER ADMINISTRATIVE HEARINGS (JUST AS THIS COURT DID IN *NOLLAN*).

In *Nollan,* this Court was confronted with a situation similar to the facts of this case: the Nollans' home had already been constructed, and the issue in the case was the validity of a challenged public access condition. The Court struck the access condition from the permit for the Nollans' home and further hearings before the Commission were not required. Other courts have provided a similar remedy. See *Rohn v. City of Visalia,* 214 Cal. App. 3rd 1463, 1475-1477, 263 Cal. Rptr. 319 (1989); *Surfside, supra,* 226 Cal. App. 3d at 1272.

Petitioners note that the issuance of a coastal development permit under the circumstances of this case is specially enjoined upon the Commission by law. Public Resources Code § 30235 and Policy 3-2 of the Santa Barbara County Coastal Plan provide that seawalls *shall be permitted* when required to protect existing structures and when designed to mitigate adverse impacts on local shoreline sand supply and so as not to block lateral beach access. There is no question that the seawall was required to protect existing structures and the Commission expressly found that the seawall was designed to mitigate adverse impacts on local shoreline sand supply. App. E,

at E-22; Negative Declaration, J.A. at 138-139. The only credible evidence before the Commission at the time of hearing established that the seawall was not located on state tidelands and therefore does not block lateral beach access. Accordingly, *Petitioners were entitled at the time of the hearing before the Commission to receive approval of a coastal development permit without the challenged walkway and lateral access easement conditions. Petitioners are entitled to nothing less today.*

In this case, the trial court found the walkway condition was not supported by evidence, declined to rule on constitutional issues and remanded the matter back to the Coastal Commission for further proceedings.

Petitioners submit that unconstitutional exactions such as the walkway and lateral access easement conditions imposed on them in this case should simply be stricken from the permit, without petitioners being required to participate in further proceedings before the Commission. In the absence of such a remedy, petitioners, who years ago were entitled to a coastal development permit for their seawall, will be subjected to unnecessary expense and the likelihood that a hostile Commission will seek its revenge in further proceedings.

This issue of the appropriate remedy in circumstances such as exist in this case presents an important federal question which should be settled by the Court.

## CONCLUSION

The same California Court of Appeal which was overruled by this Court in *Nollan* now has upheld walkway and public access conditions to a coastal development permit which are substantially more onerous than

those invalidated in *Nollan*. The Court of Appeal found the *Nollan* decision to be largely inapplicable to analysis of walkway and public access conditions to the coastal development permit in this case because "a property owner [has] no fundamental right to construct a revetment in the coastal zone without a permit." App. A, at A-7.

Therefore, as discussed above, this case presents several important and interrelated questions of federal law which arise out of the *Nollan* decision and should be settled by the Court. As discussed above, the decision of the Court of Appeal in this case conflicts with the *Nollan* decision and the decisions of state courts of last resort.

As well, by redefining the public-private boundary along the shore, the Commission and Court of Appeal have sanctioned a physical invasion of petitioners' private property in the very manner which Justice Stewart cautioned against in *Hughes v. Washington*.

Each of the questions presented for review was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. Petitioners respectfully request that the Court grant this petition for writ of certiorari.

Dated: January 26, 1993

Respectfully submitted,

SCHRAMM & RADDUE
By: DAVID C. FAINER, JR.

DAVID H. ANDERSON

*Attorneys for Petitioners*

## APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| GARY ANTOINE et al.,<br><br>Plaintiffs, Cross-Defendants and Appellants,<br><br>v.<br><br>CALIFORNIA COASTAL COMMISSION,<br><br>Defendant, Cross-Complainant and Appellant. | 2d Civil No. B051709<br>(Super. Ct. No. B051709)<br>(Santa Barbara County) |

(Filed Jul. 31, 1992)

Beachfront homeowners applied to the California Coastal Commission (Commission) for a coastal development permit to build a seawall in front of their homes. Pursuant to the California Coastal Act (Pub. Resources Code, § 30000 et seq.[1]) the Commission granted the permit on the condition, among others, that the homeowners grant public access along the top of the seawall. The condition was based on the finding that the seawall may encroach on state tidelands. The superior court granted a writ of mandate ordering the Commission to remove the

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[1] All statutory references are to the Public Resources Code unless otherwise stated.

condition, stating there was no substantial evidence to support the Commission's encroachment finding. The superior court, however, refused to decide other matters raised by the homeowners in their writ petition. The Commission appeals and the homeowners cross-appeal.

We hold that an applicant for a coastal development permit has the burden of proving that the project will be built entirely on the applicant's own land and that it will not have an adverse effect on neighboring property. We reverse the judgment granting the writ of mandate with instructions to remand to the Commission for further proceedings.

## FACTS

Sandyland Cove is a 38 unit private beachfront subdivision immediately west of the city of Carpinteria. It occupies approximately 40 percent of the Carpinteria area shoreline. Since the 1930's the beach at Sandyland has suffered substantial erosion. In 1958 Sandyland[2] constructed a seawall replacing the most seaward portion of the sand dunes that then lined the beach. After further erosion caused by the severe winter storms of the 1982-1983 storm season, Sandyland applied to the County of Santa Barbara (the County) for a conditional use permit to enlarge the existing seawall by adding 37,400 tons of rock. The result would be a revetment that extends 12 to 16 feet seaward of the existing seawall.

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[2] Unless otherwise specified "Sandyland" refers collectively to the Sandyland Cove Homeowners Association and the individual homeowners.

In late summer of 1983 Sandyland applied to the County for an emergency permit to build the seawall while the application for the conditional use permit was under review. The County granted the emergency permit subject to the condition, among others, that a regular permit be applied for within 60 days. Construction began in October of 1983 and ended in January of 1984.

In December of 1983 the County's planning commission approved the conditional use permit subject to the condition that Sandyland offer to dedicate a lateral public access easement seaward of the toe of the seawall. Sandyland appealed to the County's board of supervisors, who eliminated the condition.

In August of 1984, Sandyland applied to the County for a coastal development permit. The application was approved with the notation that pursuant to the decision of the board of supervisors Sandyland was not required to provide lateral access.

The South Central Coast Watch, a private group, appealed the permit decision to the Coastal Commission contending that the seawall extends into the water during all but extremely low tidal periods and the public's right to walk along the beach has not been protected. A separate appeal was filed by the chairman and vice-chairman of the Commission. (§ 30625.)

The Commission had photographs showing the seawall awash in the tide. A Commission staff analyst stated that the pictures were all taken after the winter storms, and that they accurately reflect conditions during most of the late fall, winter and spring. Private citizens testified that the new seawall restricts use of the beach during

high tides. Plans prepared by Sandyland's engineers showed the new seawall extending 12 to 16 feet seaward of the existing seawall.

The Commission also had a study of beach erosion commissioned by the City of Carpinteria, the Bailard/ Jenkins report. The report was made in April of 1982, prior to the heavy winter storms of that year and the completion of the new seawall. The report stated that the seawall built in 1958 was located inside the surf zone and was subject to breaking waves.

Sandyland pointed out that a State Lands Commission (SLC) mean high tide survey of 1964, plotted by its engineers on the seawall plans, showed the seawall to be constructed landward of the mean high tide line by 60 to 90 feet. SLC, however, stated that the 1964 survey line was for administrative purposes only and did not mark the true mean high tide line. A grant map from the SLC to the City of Carpinteria bears the notation that the survey was not intended to fix the true boundary line but was delineated for administrative purposes only until such time as the true boundary line is determined. Sandyland's own engineer stated that the accuracy of the survey was unknown.

The Coastal Commission's staff recommended, among other things, that Sandyland be required to remove the new seawall to a location no further seaward than the toe of the seawall constructed in 1958. The Commission received letters from Sandyland and its individual residents asking that this recommendation be rejected, and that public access not be required.

Sandyland submitted a letter from one of its homeowners stating that the new seawall was relocated landward from its originally planned location. But the letter did not indicate how far landward the seawall was moved. There was evidence that the seawall was relocated only in one spot and that was out of concern that construction had started even more seaward than the plans had provided for.

Sandyland also pointed to a statement contained in the County's negative environmental impact declaration that the new seawall encroaches two to five feet seaward of the old wall in some places and retreats landward of the old wall in a few places. There is no showing in the record as to the basis for this apparent conflict with the Commission's reading of the plans.

After a hearing, the Commission found, among other matters, the new seawall encroached 12 to 16 feet seaward of the old wall, that the project will reduce and block existing lateral beach access, and that "the revetment may have been constructed at least partially on state tidelands." The Commission decided not to require the removal of the seawall, but to grant the application on conditions.

The conditions included a public accessway along the top of the seawall with a covenant requiring Sandyland to maintain a stairway and the surface of the seawall in a condition suitable for public use, and an offer to dedicate an easement for public access from the toe of the revetment seaward.

After the Commission denied reconsideration, Sandyland filed a petition in superior court seeking a writ of

mandate directing the Commission to issue the permit without the public access requirements. Sandyland included with the petition a complaint for declaratory relief and damages in inverse condemnation. The inverse condemnation action was severed from the mandate and declaratory relief portions of the case.

The trial court reviewed the Commission's decision under the substantial evidence test. The court stated that it was the Commission's position that the "walkway condition," that is, the condition for a walkway on top of the breakwater, was defensible only if the seawall was located on state tidelands. The court determined there was no substantial evidence to support such a finding.

The court issued a writ of mandate directing the Commission to set aside its decision, to reconsider the matter and to take any further actions as may be required by law. The court declined to decide the legality of the lateral access easement extending seaward from the toe of the seawall or other issues raised by Sandyland.

Both the Commission and Sandyland appeal. SLC has filed an amicus brief in support of the Commission, and the Pacific Legal Foundation (PLF) has filed an amicus brief in support of Sandyland.

## DISCUSSION

### I

### STANDARD OF REVIEW IN THE TRIAL COURT

First we must determine whether the trial court was correct in applying the substantial evidence test in its review of the Commission's decision, or whether the

independent judgment test should apply. The independent judgment test applies where the decision of the administrative agency affects or involves a "fundamental vested right;" otherwise the trial court is limited to determining whether the administrative findings are supported by substantial evidence and whether the agency erred in its application of the law. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 395; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.)

In *Whaler's Village Club v. California Coastal Commission* (1985) 173 Cal.App.3d 240, 251-254, we held a property owner had no fundamental vested right to construct a revetment in the coastal zone without a permit, and thus the proper standard of review in the trial court was substantial evidence. Other courts have agreed. (See, e.g., *Barrie v. Cal. Coastal Com.* (1987) 196 Cal.App.3d 8, 14-16; *Paoli v. Cal. Coastal Com.* (1986) 178 Cal.App.3d 544, 550-551.)

Sandyland and the PLF argue that such cases are no longer valid in light of the United States Supreme Court's decision in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (97 L.Ed.2d 677, 107 S.Ct. 3141). There the Commission granted the Nollans a coastal development permit to build a larger house on their property on the condition that they allow the public a lateral access easement to pass between their seawall and the mean high tide line. The Nollans challenged the imposition of the condition as an uncompensated taking. The Commission defended the condition as a valid exercise of the police power. It argued that there is a legitimate state interest in protecting the public's ability to see the beach, in assisting the public to overcome the psychological barrier to

using the beach along a developed shoreline, and in preventing congestion on public beaches.

The court stated that if the Nollans' new house substantially impeded any of these purposes the Commission could deny their permit outright unless the denial would interfere so drastically with their use of their property as to constitute a taking. The court reasoned that if the Commission could deny the permit outright, it could grant the permit on a condition designed to accomplish the same purpose as denial. If, however, the condition substituted for the prohibition "utterly fails" to further the end advanced as justification for the prohibition, "the evident constitutional propriety disappears." (*Nollan v. California Coastal Commission, supra,* 483 U.S. 825, 837.)

Sandyland relies in particular on the following passage from *Nollan*: "As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Nollan v. California Coastal Commission, supra,* 483 U.S. 825, 841.)

But a statement that where a conveyance of property is required the court is inclined to be particularly careful that the state interest advanced is substantial, does not mean there is a fundamental vested right to complete a project free of access conditions. To the contrary, the

Nollan court stated that if the Commission had attached to the permit some condition that would have protected the public's ability to see the beach "the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." (*Nollan v. California Coastal Commission, supra,* 483 U.S. 825, 836.)

As we read Nollan, there is no fundamental right to build a structure that detrimentally affects public access free of conditions designed to ameliorate the detrimental effect of the structure. Thus we can find nothing in Nollan that would require the trial court to apply its independent judgment.

Nor is Sandyland aided by *Surfside Colony Ltd. v. California Coastal Commission* (1991) 226 Cal.App.3d 1260. There the Court of Appeal held there was no substantial evidence of a "solid connection" between the public burden created by coastal construction of a seawall and the necessity for a public easement; the court expressly declined to decide whether the trial court used the wrong test in reviewing the Commission's decision. (*Id.*, at p. 1263.)

PLF suggests the independent judgment test should apply because judicial deference is made impossible due to the Commission's interest in the outcome in the case. It argues that the Commission as an agent of the state has a pecuniary interest in getting prize beach land for free, and because the Commission is made up of political appointees, there may be political pressure on certain

members to maximize the state's ownership of coastal property.

PLF relies on *Ward v. Village of Monroeville* (1972) 409 U.S. 57 (34 L.Ed.2d 267, 93 S.Ct. 80) in support of its argument. There, pursuant to state law, the mayor sat as judge in cases involving ordinance violations and certain traffic offenses. Fines arising from the mayor's court provided a substantial income to the village. The Supreme Court held that the mayor's executive responsibilities for village finances may make him partisan to maintain a high level of contribution from his court, and that this inconsistency with the mayor's judicial position "'necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' " (*Id.*, at p. 60.)

In *Ward* the presumption of bias arose from the mayor's dual position as executive in charge of the village finances and judge with the power to levy fines benefiting the village treasury. Here the Commission does not have a similar conflict; it neither gains nor loses by its decisions. Contrary to PLF's contention, the Commission has no power to grant or deny a permit in a manner that will take private property for public use without paying compensation. (§ 30010.[3]) Unlike a mayor whose job it is

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[3] Section 30010 provides: "The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not

to increase the city treasury, the Commission's task is to balance the need to protect the public beach against the homeowners' need to protect their homes. (See §§ 30214, subd. (b), 30235[4]; *Barrie v. Cal. Coastal Com., supra,* 196 Cal.App.3d 8, 21-22.) That Commission members are political appointees, does not mean they are so subject to political pressure that bias must be presumed.

II

BURDEN OF PROOF

In deciding there was no substantial evidence to support a finding that the revetment was constructed at least

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intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States."

[4] Section 30214, subdivision (b) provides: "It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution."

Section 30235 provides: "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible."

partially on public land, the trial court apparently placed the burden of proof on the Commission. We hold that this was error.

Although the Coastal Act does not expressly place the burden of proof on any party, the general rule applicable to land use permits is that the burden is on the applicant. (See, e.g., *Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 203 [conditional use permit]; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 521 [variance].) We see no reason why coastal development permits should be an exception.

Moreover, the Coastal Act provides that where there is a conflict in carrying out the provisions of the Act, the conflict should be resolved in a manner which on balance is most protective of significant coastal resources. (§ 30007.5.[5]) Placing the burden of proof on the applicant for a development permit is one way of striking the balance in favor of protecting coastal resources. (See *Reed v. California Coastal Zone Conservation Comm'n.* (1975) 55 Cal.App.3d 889, 895.)

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[5] Section 30007.5 provides: "The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies."

There is no injustice in placing the burden of proof on Sandyland. Sandyland is the primary, if not the exclusive, beneficiary of the seawall project. The burden of proof with its attendant costs should fall on the party reaping the benefits. It is not too much to ask of an applicant for a development permit to show that the project is or will be built entirely on the applicant's own land, and that it will not have an adverse effect on neighboring properties.

PLF's citation to *Surfside Colony, Ltd. v. California Coastal Commission, supra,* 226 Cal.App.3d 1260, is unavailing. There the appellate court discussed what type of evidence was necessary to establish a burden on public access when building a seawall. The court rejected the use of opinion evidence about beach erosion in general. (*Id.* at p. 1271.)

The *Surfside* court did not discuss which party had the burden of proof, and the court never held the Commission had the burden. Even if the court in *Surfside* in fact placed the burden of proof on the Commission, the case would not be authority on the question of burden of proof; a case is not authority for propositions not considered. (*Wasson v. Atlantic National Ins. Co.* (1962) 207 Cal.App.2d 464, 471.) In any event, to the extent *Surfside* can be read as holding the burden is on the Commission to prove that the seawall was built on public property or otherwise burdens public access, we decline to follow it.

## III

## SUBSTANTIAL EVIDENCE

The Commission's finding that the seawall may have been built partially on public property is simply another way of stating that Sandyland did not carry its burden of proving the seawall was built entirely on its own land. Under the substantial evidence rule all evidence most favorable to the Commission's finding must be accepted as true, and that which is unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.)

Here there was no evidence that would compel the Commission to find as a matter of law the revetment was built entirely on private property.

The only survey favorable to Sandyland purporting to show the mean high tide line was the SLC survey of 1964. But the makers of the survey never intended that it serve as an accurate description of the mean high tide line, and a grant map of the area so notes. Even Sandyland's own engineer said that the accuracy of the survey is unknown. That SLC stated the survey line was created for administrative purposes does not mean the Commission is bound by it in an administrative hearing. There is nothing in the record that leads to the conclusion the SLC intended that the line establish a boundary binding on the Commission or anyone else.

Nor is there merit to Sandyland's argument that the Commission mischaracterizes the toe of revetment as being 12 to 16 feet seaward of the old revetment. The

Commission's finding was based on a reading of the plans prepared by Sandyland's engineers. Sandyland, however, points to a statement in the County's negative environmental impact declaration that the new wall extends two to five feet seaward of the old wall in some places and retreats landward of the old wall in a few places. It argues the County's staff was in a position to see and compare the old and new wall, whereas the Commission could not because the old wall had been covered during construction.

Simply because the County's staff was in a position to inspect the old and new seawalls does not mean that it actually saw the two walls, or if it did that it made an accurate comparison. Sandyland points to nothing in the record that discloses any foundation for the County's finding. It may well have been based on a misreading of the plans. A homeowner's letter to the Commission stating that the seawall had been relocated landward does not conclusively support the County's finding. There was evidence the seawall was moved only in one spot out of concern that construction had started even more seaward than the plans called for.

The Commission as a finder of fact could reasonably determine that Sandyland had not carried its burden of proof.

## IV

## MEAN HIGH TIDE LINE

Having decided Sandyland has the burden of proof, we think it only fair to give Sandyland the opportunity to

present further evidence to the Commission. This necessarily involves the question of how to determine the mean high tide line. This is the line that divides public from private property. We hope the following discussion will give the parties some guidance in resolving this question.

The mean high tide line is formed where a plane of water at mean high tide intersects the shore. (*People v. William Kent Estate Co.* (1966) 242 Cal.App.2d 156, 160.) It is composed of a vertical and a horizontal element. The vertical element is the elevation of water as measured at stations near the shore at mean high tide. Once this is established it remains fixed. The horizontal element is the place where the water meets the shore. This can vary with changes in the slope and contour of the beach.

(a) Vertical Element

The elevation of the water near the shore is influenced principally by the sun and moon's gravitational force. During the new moon, the sun and moon are on the same side of the earth, tidal forces work in conjunction and high water rises higher and low water falls lower than at other times. These tides are called "spring tides." Seven and a half days later the moon has passed through the first quarter of its journey around the earth and is said to be in "quadrature." The sun and moon are at right angles to the earth, their gravitational forces are not working in conjunction and the tides do not rise as high or fall as low as the spring tides. These are called "neap tides." (See 1 Shalowitz, Shore and Sea Boundaries (1962) U.S. Dept. of Commerce Publication 10-1, pp. 86-87.)

Seven and a half days later the moon is on the opposite side of the earth from the sun, gravitational forces are once again working in conjunction and spring tides recur. In another seven and a half days the moon is in its final quadrature, and neap tides reappear. (See 1 Shalowitz, *supra*, at pp. 86-87.)

Due to a variety of factors, including periodic changes in the distance and declination of the moon, water levels at high tides are not consistent from month to month. Thus a permanent and fixed mean is found by recording the high tides during a 19-year period known as a "tidal epoch." (See 1 Shalowitz, *supra*, at p. 89, fn. 16.) The recording is done at off-shore stations.

An early California Supreme Court case, *Teschemacher v. Thompson* (1861) 18 Cal. 11, 21, described the mean high tide as the average of all high neap tides. The court arrived at this esoteric pronouncement of what it thought the common law to be by relying on the wisdom of venerable authority, Lord Chief Justice Hale's *De Jure Maris*, written in the middle of the 17th century. Venerable authority is not always the best guide.

As amicus SLC points out, Lord Hale did not use the precise definition of the term "neap tides," but instead used the term to mean usual high tides. (See 1 Shalowitz, *supra*, at p. 92.)

The United States Supreme Court in *Borax Consolidated v. City of Los Angeles* (1935) 296 U.S. 10, 26-27, determined that for purposes of the federal government the mean high tide is the average of all high tides, not only high neap tides. California Supreme Court cases

decided after *Borax* do not mention neap tides with reference to the mean high tide. (See, e.g., *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478, fn. 13.) Although the Court of Appeal in *People v. William Kent Estate Co., supra,* 242 Cal.App.2d 156, 161, used the average of all high neap tides as the standard, we conclude that today the rule in California is the same as the federal rule. The mean high tide is the average of all high tides.

(b) Horizontal Element

Where the beach is made of rock or is not subject to wind and wave action the plane of water at mean high tide will consistently intersect with the shore at the same place. Under such circumstances, it is possible to determine a fixed mean high tide line.

But where the beach is composed of soft sand and is subject to wave action, the slope and contour of the beach change constantly. With each change in the slope or contour of the beach, the place where the plane of water at mean high tide intersects the beach, that is, the mean high tide line, also changes. The result is a continually changing boundary between public and private land. Given the definition of mean high tide line and the physical characteristics of soft sand beaches, this is the nature of boundary lines on ocean front property.

Sandyland contends that a fixed mean high tide line should be determined by the method suggested in *People v. William Kent Estate Co., supra,* 242 Cal.App.2d 156, 161. There the beach was subject to a cyclical movement of sand which increased the land area in summer and decreased it in winter. The state obtained an injunction

against a private landowner forbidding him from interfering with the public's use of land seaward of the high water mark as the mark may migrate landward and seaward from time to time. The Court of Appeal found that it would be too uncertain to enforce an injunction with a migrating line. The appellate court suggested the parties determine on retrial whether the sand movements were substantially the same distance each year. This could afford them a basis for determining an average place where the plane of water at mean high tide intersected the shore.

The SLC criticizes *William Kent Estate* on the grounds that the time and expense involved in finding the average line precludes any practical application of the method. Further, assuming the average could be determined, it would result in a private claim of ownership to lands that are awash in tides when the true mean high tide line is landward of the average line. At such times the land is public. The SLC suggests the solution is to adopt the rule in *Internal Improvement Fund v. Ocean Hotels, Inc.* (1974) 40 FLA. Supp. 26, 33, that the mean high tide line is determined when the beach is in its most landward or "winter" profile.

Neither solution is satisfactory. Each results in a boundary that differs from the true mean high tide line most of the time. Adopting either rule shifts boundary lines in such a way that public and private landowners may be deprived of valuable rights at various times of the year. We question whether we have the authority to affect such rights by judicial fiat even if we were inclined to do so.

Moreover, the rules set forth in *William Kent Estate* and *Ocean Hotels* are helpful in determining a fixed boundary line only under limited circumstances. Thus the court in *William Kent Estate* instructed the parties to determine whether the movement of sand was substantially the same each year. Such a finding is necessary to establishing a fixed average line because substantial changes in the amount of sand removed and deposited each year would result in a changing average. Similarly, the winter profile rule of *Ocean Hotels* can result in a fixed boundary line only where the winter profile of the beach is substantially the same each year.

Neither case discusses the problem of fixing a boundary line where the beach is subject to continuous landward erosion. Under such circumstances the mean high tide line will also be subject to landward movement, and it will be impossible to determine a fixed boundary. After a period of erosion, any boundary previously fixed under the rule in *William Kent Estate* or *Ocean Hotels* would bear no relationship to the true mean high tide line. It may result in a private claim to ownership of land that is permanently under ocean water.

A moving boundary may therefore result in a development project encroaching on public lands at some times of year and not at others. Because a private landowner has no right to build a project that encroaches on public lands for even part of the time, such a partial encroachment is sufficient to justify the imposition of access conditions. On the other hand, a moving boundary line does not make it impossible for a permit applicant to carry his burden of showing the project will not encroach

on public lands. In many cases the project may be built sufficiently landward that no encroachment is probable.

The parties should also keep in mind that a negotiated agreement is a worthwhile avenue to pursue. (§ 6336.[6])

## V

## CROSS-APPEAL

Next we consider various issues raised by Sandyland on cross-appeal.

Sandyland contends the trial court erred in not declaring the walkway condition to be unconstitutional. The contention is based on the theory that Sandyland has shown the seawall to have been built entirely on its own land. Where, as here, an applicant for a seawall permit has failed to carry its burden of showing the seawall will not encroach on state tidelands, we see nothing unconstitutional about either denying the application or granting it on condition that the public have a walkway on top of the seawall.

Similarly, Sandyland's failure to carry its burden of showing the seawall will not encroach on state tidelands

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[6] Section 6336 provides in part: "The [State Lands Commission] may negotiate with any person or local agency having or claiming an interest in any land affected by boundaries described by the 'Preliminary Description of Ungranted Tideland Boundaries,' for the purpose of reaching a boundary agreement. Any such boundary agreement shall be binding on the state and other parties thereto when approved by the commission.".

will support a condition requiring an offer to dedicate an easement for lateral access from the toe of the seawall seaward, even though it might be said that such an offer to dedicate is superfluous.

Sandyland contends the trial court erred in declining to rule that the Commission acted unconstitutionally when it applied a "mandatory access" provision of the County's local coastal plan. The provision in question states, "For all new development between the first public road and the ocean, granting of lateral easements to allow for public access along the shoreline shall be mandatory."

There is no doubt that had the Commission required public access for no better reason than that the seawall constituted new development on private land, it would have run afoul of *Nollan*. But there is also no doubt that the Commission construed the mandatory access requirement of the local coastal plan as requiring more than a finding that the seawall constituted new development. Had the Commission read the mandatory access requirement literally, it would not have taken evidence and made findings on the location of the project in relation to the mean high tide line. It is apparent the Commission construed the local coastal plan as requiring a public access easement only where the development project burdens public access.

Sandyland next contends the court erred in declining to rule that it had not received a fair hearing. It points out that the appeal was brought by the chairman and vice-chairman of the Commission, and that the walkway and lateral access conditions were imposed by a seven-to-five

margin, with the appealing commissioners making the majority.

An appeal by any two members of the Commission is expressly authorized by statute. (§ 30625, subd. (a).[7]) Nothing in the statute prohibits an appealing commissioner from participating in the hearing on appeal, and Sandyland raised no objection until after it received the Commission's adverse ruling.

At the hearing in this case the Commission chairman asked the executive director to explain how appeals are made. The director explained that if in his opinion a case merits review he will make a recommendation to the Commission chairman and vice-chairman. The telephone call or written material the commissioners receive does not constitute a full hearing, an appeal implies no decision of the final outcome, and the appealing commissioners retain their ability after the full public hearing to decide the matter.

Sandyland cites no authority in support of its contention that a fair hearing required the commissioners who appealed to abstain from participating. The Commission's executive director made it clear than an appeal by a commissioner is nothing more than a decision that the matter should be subject to a hearing. It is not a determination on the merits. It is similar to our Supreme Court

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[7] Section 30625, subdivision (a) provides in part: "[A]ny appealable action on a coastal development permit or claim of exemption for any development by a local government or port governing body may be appealed to the commission by an applicant, any aggrieved person, or any two members of the commission."

ordering on its own motion a review of a Court of Appeal decision. (Cal. Rules of Court, rule 28(a)(1).[8])

Finally Sandyland contends the requirement that it open and maintain the walkway violated section 30212, subdivision (a). That section provides in part, "Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway."

No doubt the provision applies where a project is built entirely on private property. A more difficult question is whether our Legislature intended the burden of maintenance and liability to fall on the public where a private party is allowed to construct a project lying in part on public lands. Because on remand Sandyland may be able to show the seawall lies entirely on private land, we need not decide that question here.

The judgment granting the writ of mandate is reversed with instructions to remand the matter to the Commission for further proceedings. Costs are awarded to the Commission.

*CERTIFIED FOR PUBLICATION.*

GILBERT, J.

We concur:

STONE, P. J.
YEGAN, J.

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[8] Rule 28(a)(1) provides in part: "If no petition for review is filed, within 30 days after a decision of a Court of Appeal becomes final as to that court the Supreme Court, on its own motion, may order review of the Court of Appeal decision."

## APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| GARY ANTOINE et al.,<br>Plaintiffs, Cross-Defendants and Appellants,<br>v.<br>CALIFORNIA COASTAL COMMISSION,<br>Defendant, Cross-Complainant and Appellant. | 2d Civil No. B051709<br>(Super. Ct. No. B051709)<br>(Santa Barbara County) |

(Filed August 26, 1992)

THE COURT:

It is ordered that the opinion filed herein on July 31, 1992, be modified in the following particular:

On page 2 [page A-2], delete the second sentence of the second full paragraph.

This order modifying opinion does not change the judgment.

Plaintiffs, Cross-Defendants and Appellant's petition for rehearing is denied.

## APPENDIX C

Second Appellate District, Division Six, No B051709
S028698

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK
(Filed OCT 29, 1992)

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GARY ANTOINE Et Al., Cross-Defendants and Appellants

v.

CALIFORNIA COASTAL COMMISSION, Cross-Complainant and Appellant

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Appellants' petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed July 31, 1992, which appears at 8 Cal.App.4th 641. (Cal. Const., Art. VI, Section 14, rule 976, Cal. Rules of Court.)

/s/ LUCAS
Chief Justice

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## APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

| | |
|---|---|
| GARY ANTOINE, et al., Petitioners, vs. CALIFORNIA COASTAL COMMISSION, Respondent. AND RELATED CROSS-ACTION. | No. 153921 STATEMENT OF DECISION (Filed May 14, 1990) |

This matter came regularly before this Court on November 13, 1989, for hearing. Petitioners, plaintiffs and cross-defendants ("petitioners") were represented by John R. Mackall of Seed, Mackall, Nida & Cole; David C. Fainer, Jr., of Schramm & Raddue; and David H. Anderson. Respondent, defendant and cross-complainant CALIFORNIA COASTAL COMMISSION ("Commission") was represented by Steven H. Kaufmann, Deputy Attorney General.

### I. INTRODUCTION

In this case, petitioners, the homeowners of Sandyland Cove, have challenged the lateral access easement and walkway conditions imposed by the California Coastal Commission ("Commission") in connection with a coastal development permit for a rock-revetment type seawall constructed pursuant to an emergency permit at Sandyland Cove near Carpinteria, California.

Petitioners seek a writ of mandate directing the Commission to issue the coastal development permit without the lateral access easement and walkway conditions (collectively, the "access conditions") and a declaratory judgment that the Commission may not lawfully impose access conditions upon the coastal development permit for the Sandyland seawall. Additionally, petitioners have alleged that the imposition of the access conditions constitutes a taking of private property for public use without compensation and seek damages.

The Commission has filed a cross-complaint for declaratory relief, permanent injunction, civil penalties, fines and exemplary damages.

Prior to hearing in this matter, the parties stipulated to, and the Court ordered, bifurcation of trial of causes of action in the case, and only the mandate and declaratory relief causes of action were tried.

## II. FACTS

The petitioners in this case are the owners of thirty-eight homes along Sandyland Cove, near Carpinteria, California. When the homes were originally built (some date back to the 1930's), the Sandyland Cove beach was quite wide and provided ample protection from heavy surf during storms. However, for several periods of a number of years prior to the 1960's, the Santa Barbara Harbor was allowed to interrupt natural sand transport processes, trapping much of the sand that would otherwise have traveled eastward along the Santa Barbara coastline. This "starved" the Sandyland Cove beach of sand and the beach became narrower.

As a result the Sandyland Cove homeowners built a seawall in 1958 to protect their homes against damage from heavy surf during storms.

During the El Nino storms of 1983, the then-existing Sandyland seawall was partially destroyed, with waves overtopping the seawell and causing flooding around the homes in Sandyland Cove.

Following these winter storms in 1983, the Sandyland homeowners applied to the County of Santa Barbara on May 17, 1983, for authority to construct improvements to the existing seawall in order to protect their homes.

The improvements to the seawall were designed by Penfield and Smith, a local engineering firm, in consultation with Dr. James A. Bailard, an oceanographic consultant whose detailed study of the Carpinteria beach was introduced by the Coastal Commission into the record in this case.

The plans for the seawall improvements showed the mean high tide line established by the State Lands Commission's 1964 survey, the location of lots and homes, the short bluff and land topography, and the layout and design of the proposed seawall improvements to be built over the existing seawall. Revised plans were submitted in August, 1984, to incorporate a modified design for portions of the proposed improvements, which lowered the height of the revetment, and add a splash wall landward of portions of the revetment.

On September 16, 1983, the County granted an emergency permit for the seawall improvements, having determined that "this situation constitutes an emergency

in accordance with Sec. 35-58 and Sec. 35-171 of the Coastal Zoning Ordinance and immediate action is warranted." The emergency permit was made subject to conditions, including a condition stating that the structure permitted may be subject to change, alteration or removal depending upon the outcome of the review of the conditional use permit application.

In October, 1983, the homeowners began the construction work necessary to bring the seawall up to the required strength. During the construction of the improvements to the old seawall, a representative of the Coastal Commission, Phil Mees, made a physical inspection on site. He met for two hours with Frank Serena, a representative of the homeowners, who was supervising the construction. Mr. Mees reviewed the plans with Mr. Serena, looked over the existing seawall, discussed the repair work, requested that the toe of the seawall be moved landward in one location (AR 738) at the extreme downcoast end of the seawall (AR 703), and indicated no objection to the construction. Mr. Serena arranged for the construction crew to move the wall in that area to the location requested by Mr. Mees. The improvements were completed at a cost of more than $600,000.

Following completion of the emergency improvements to the seawall, petitioners proceeded with the normal Santa Barbara County procedure, which called for approval of a conditional use permit. The County held a public hearing on September 22, 1983, at which a Negative Declaration was adopted.

On December 14, 1983, the Planning Commission held a hearing on the application for the conditional use permit. The Staff Report recommended approval, subject

to a condition that petitioners offer to dedicate a lateral access easement for public use between "the toe of the seawall and the mean high tide line."

The Planning Commission approved the conditional use permit, finding that: "The proposed seawall would protect existing primary structures . . . " The Planning Commission conditioned approval on petitioners' offer to dedicate a lateral access easement from the toe of the seawall to the mean high tide line.

The Sandyland Cove homeowners then appealed to the Board of Supervisors for reconsideration of the access requirement. On February 6, 1984, the Board of Supervisors heard the appeal, and removed the lateral access easement condition from the permit.

The last step in the Santa Barbara County process is the issuance of a coastal development permit, which is the final permit issued by the County under its Local Coastal Plan. The coastal development permit is issued upon compliance by the applicant with the conditional use permit.

After the County issued petitioners a coastal development permit for their seawall, the Chairman and Vice-Chairman of the Coastal Commission appealed the issuance of the coastal development permits, as did a private group, the Central Coast Watch.

On November 29, 1984, the Coastal Commission held a hearing on the appeal. At the conclusion of the hearing, a motion to impose new public access conditions on the coastal development permit was carried by a 7-5 margin.

On January 9, 1985, the Commission formally adopted their findings and conditions of approval, by a vote of 6-5.

Petitioners challenge the Special Conditions 1(a), 1(b) and 1(c), included as conditions of approval by the Commission, which provide:

"1. *Replacement of Public Access.*

"(a) *Accessway on top of revetment.* Prior to transmittal of the permit, submit revised plans subject to the review and approval of the Executive Director showing a pedestrian accessway at least 10 feet in width on or behind the crown of the revetment, including addition of suitable surfacing material to permit access along the revetment, and addition of concrete staircases from the crown of the revetment to the beach . . .

"(b) *Deed restriction.* Prior to the transmittal of the permit, and the commencement of construction, the applicant shall execute and record a deed restriction, in a form and content approved by the Executive Director, restricting the applicant from interfering with public access on the revetment crown as described above and requiring the applicant to maintain the surfacing material and staircase in a condition suitable for public use.

"(c) *Offer of dedication* . . . (T)he applicant shall . . . record a document . . . irrevocably offering to dedicate an easement for lateral public access and passive recreational use . . . and such easement shall be for the entire width of the property extending seaward from the toe of the revetment to the mean high tide line . . . The

offer shall run with the land in favor of the People of the State of California . . . "

On December 27, 1984, the homeowners requested reconsideration. On January 22, 1985, the Commission held a hearing, and denied the request for reconsideration. This action followed.

## III. ISSUES

Each of the parties has submitted a lengthy Request for Statement of Decision, each of which exhaustively details a variety of issues for resolution. In view of the Court's ruling below, it is unnecessary to rule on many of the issues for which each of the parties has requested a Statement of Decision.

Rather, the Court rules on the following issues:

1. Is declaratory relief an appropriate vehicle for challenging the Commission's action?

2. What is the appropriate standard of review to be applied, i.e., independent judgment or substantial evidence?

3. Did the Commission abuse its discretion in imposing the access conditions?

4. Is the action of the Coastal Commission subject to challenge on constitutional grounds including impermissible taking of private property without compensation?

5. Is any of the relief sought by petitioner foreclosed due to the failure to exhaust administrative remedies and/or due to failure to plead facts and issues?

## IV. DECLARATORY RELIEF

Under the facts of this particular case and the issues presented, the Court finds that administrative mandamus is the appropriate remedy and declaratory relief is not appropriate.

## V. STANDARD OF REVIEW

In deciding whether there was a prejudicial abuse of discretion because the findings are not supported by the evidence, the Court must first determine whether the applicable standard of review is the independent judgment test or the substantial evidence test. Petitioners contend that the Supreme Court decision in *Nollan v. California Coastal Commission* requires that the independent judgment test be applied to review whether the findings are supported by the evidence. The Commission contends substantial evidence test is the applicable standard of review.

The Court does not believe that the Supreme Court decision in *Nollan v. California Coastal Commission* requires that the independent judgment test be applied in this case. Accordingly, the Court will apply the substantial evidence test.

## VI. THE COMMISSION ABUSED ITS DISCRETION IN IMPOSING THE ACCESS CONDITIONS

As discussed previously, counsel for respondent made it quite clear at the hearing that the Commission's imposition of the walkway condition in this case was defensible only on the basis of the Commission's finding

that the seawall was located on State tidelands. Preliminarily, the Court has doubts such a finding was made. At AR 914, which is page 6 of the Commission's findings, there is the following language: "There is substantial evidence at the site and in the project file that the development *may* have been constructed at least partially on State tidelands (emphasis added)." This language is more on the order of speculation than a finding. However, assuming it qualifies as a finding, there is no substantial evidence to support it.

*Civil Code* §830 makes it clear that the line of demarcation between private lands and State tidelands is the "ordinary high water mark." In the case of *People v. William Kent Estate,* 242 Cal App 2d 156, the Court in an exhaustive review of the applicable laws concluded that the ordinary high water mark as a boundary is to be determined by taking the average of all high neap tides covering a period of 18.6 years. *People v. William Kent Estate, supra,* 159, 161.

Respondent took no evidence regarding location of the high water mark. It did nothing more than dismiss as outdated a State Lands Commission survey of 1964, which showed the ordinary high water mark substantially seaward of the location of the seawall. The "pragmatic evidence" to which respondent refers in its points and authorities relates only to observed conditions during an extremely limited period of time and falls far short of the kind of substantial evidence which would support a reasonably accurate finding as to the ordinary high water mark.

The pedestrian walkway condition is a lateral access condition. Apparently, counsel for the parties regard the condition 1(c) which requires an offer of dedication of an easement for lateral access forward of the toe of the seawall and extending to the mean high tide line as an additional lateral access condition.

If the lateral access requirement contained in condition 1(a) and 1(b) can in fact be supported by substantial evidence that the wall is in fact located on State tidelands then condition 1(c) is meaningless.

Presumably, if the walkway condition is not sustainable, then the issues implicit in condition 1(c) will need to be resolved. The Court is not convinced that the *Nollan* case precludes any lateral access condition whatsoever. However, at this point that issue need not be resolved, and the Court will not attempt to resolve it.

## VII. NO NEED TO RULE ON CONSTITUTIONAL ISSUES

Given the Court's decision, it is unnecessary for the Court to decide any of the constitutional issues argued by petitioners.

## VIII. PETITIONERS NOT FORECLOSED FROM RELIEF

The Commission asserts that petitioners are foreclosed from relief by reason of failure to exhaust administrative remedies and failure to plead facts and issues.

For purposes of this Decision, the only question put in issue by the Commission which needs to be discussed

is petitioners' alleged failure to raise the issue of the location of the ordinary high water mark with relation to the properties in question, either in the administrative proceedings or in its petition for writ of mandate.

The Court finds it difficult to grasp the Commission's position in this regard. The Commission's points and authorities, as clarified during oral argument, make it clear that the imposition of the access condition was premised upon the Commission finding that the seawall was located on State tidelands. This puts the location of the ordinary high water mark squarely in issue and arguments relating to exhaustion of the administrative remedies are meaningless.

There is no basis for the Commission's arguments that petitioners are foreclosed from relief.

## IX. RELIEF GRANTED ON WRIT OF MANDATE

Judgment shall be entered ordering a peremptory writ of mandamus to issue from this Court, remanding the proceedings to the Commission and commanding the Commission to set aside its decision and to reconsider its action in light of this Court's Statement of Decision, and to take any further action required by law.

DATED: May 14, 1990.

/s/ WILLIAM L. GORDON
William L. Gordon
Judge of the Superior Court

## APPENDIX E

STATE COASTAL COMMISSION
REVISED FINDINGS
STAFF REPORT ON APPEAL

Adopted by State Commission on 1/9/85

Permit granted by the County of Santa Barbara

*DECISION OF LOCAL GOVERNMENT:* Permit granted for the enlargement of rock revetment.

*PERMIT APPLICANT:* Sandyland Cove Homeowners Association, Ronald White President

*PROPERTY OWNERS:* Member of the Sandyland Cove Homeowners Association

*DEVELOPMENT LOCATION:* Across oceanfronting residential properties shoreward of Del Mar Avenue, Sandyland Cove, Carpinteria, Santa Barbara County.

*DEVELOPMENT DESCRIPTION:* On 38 single family residential properties, add 37,400 tons of rock over and seaward of an existing rock revetment. Project extends along approximately 1/2 mile of beach.

*APPELLANTS:*
1. South Central Coastwatch
2. Chairman and Vice Chairman of the California Coastal Commission

STAFF RECOMMENDATION:

Staff recommends that the Commission determine that a substantial issue exists as to the conformity of the development with the certified Local Coastal Program and with regard to the public access and public recreation policies of Chapter 3 of the Coastal Act of 1976, and

approve the project with conditions regarding public access and seawall location.

SUBSTANTIVE FILE DOCUMENTS:

Santa Barbara County File 83-CP-47-CZ

Beach Erosion and Pier Study for the City of Carpinteria (1982 Bailard/Jenkins Consultants)

COMMISSIONERS VOTING:

YES: Franco, Hisserich, Bellerue, McNeil, Wornum, Nutter

NO: MacElvaine, McInns, McMurray, Shipp, Wright

12-21-84

STAFF RECOMMENDATION ON THE COASTAL PERMIT

The staff recommends that the Commission adopt the following resolution:

I. APPROVAL WITH CONDITIONS

The Commission hereby grants, subject to the conditions below, a permit for the proposed development on the grounds that, as conditioned, the proposed development conforms with the Santa Barbara County Local Coastal Program and conforms with the public access and recreational policies of Chapter 3 of the Coastal Act, and the development will not have any adverse effect on the

environment within the meaning of the California Environmental Quality Act.

## II. CONDITIONS

Prior to the transmittal of the coastal development permit, the applicant shall submit to the Executive Director, for his review and approval:

1. Replacement of public access.

(a) *Accessway on top of revetment*. Prior to transmittal of the permit, submit revised plans subject to the review and approval of the Executive Director showing a pedestrian accessway at least 10 feet in width on or behind the crown of the revetment, including addition of suitable surfacing material to permit access along the revetment, and addition of concrete staircases from the crown of the revetment to the beach. Existing signs prohibiting public access along the revetment shall be removed. The revised plans shall be accompanied by a letter of commitment to commence the construction within the month of May, 1985 and complete the construction by July 15, 1985. The letter shall commit the applicant to providing the Executive Director with a signed contract for the above work by January 1, 1985; and

(b) *Deed restriction*. Prior to the transmittal of the permit and the commencement of construction, the applicant shall execute and record a deed restriction, in a form and content approved by the Executive Director, restricting the applicant from interfering with public access on the revetment crown as described above and requiring the applicant to maintain the surfacing

material and staircase in a condition suitable for public use. Such restriction shall be recorded free of prior liens except for tax liens, and free of prior encumbrances which the Executive Director determines may affect the restriction, and shall run with the land, binding successors and assigns of the applicant or landowner. The restriction may include reasonable provisions for limiting or prohibiting public access during high seas when access would be inconsistent with public safety; and

(c) *Offer of dedication.* Prior to the transmittal of the coastal development permit, the applicant shall execute and record a document, in a form and content approved by the Executive Director of the Commission, irrevocably offering to dedicate an easement for lateral public access and passive recreational use to a public agency or a private association approved by the Executive Director. The document shall include legal descriptions of both the applicant's entire parcel and the easement area; and such easement shall be for the entire width of the property extending seaward from the toe of the revetment to the mean high tide line.

Such easment shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such period running from the date of recording.

2. Assumption of Risk and Maintenance

Prior to transmittal of the permit, the applicant shall submit to the Executive Director a deed restriction for recording free of prior liens except tax liens, that binds the applicant and any successors in interest. The form and content of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicants understand that the site is subject to extraordinary hazard from erosion and flooding, and the applicants assume the liability from these hazards; (b) the applicants unconditionally waive any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; (c) the applicants understand that construction in the face of these known hazards may make them ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of erosion or flooding;

3. Storm Design and Debris Removal

The applicant shall submit certification by a registered civil engineer that the proposed revetment/seawall is designed to withstand storms comparable to the winter storms of 1982-83. The applicant shall, in accepting this permit, agree to remove from the beach any portion of the revetment that is deposited on the beach as a result of construction or revetment failure.

At all times the use of sand from the beach and littoral regime to cover the revetment is prohibited.

4. State Lands Commission Review

Prior to the transmittal of the permit, the applicant shall obtain a written determination from the State Lands Commission that:

(a) No State lands are involved in the development; or

(b) State lands are involved in the development and all permits that are required by the State Lands Commission have been obtained, or

(c) State lands may be involved in the development, but pending a final determination an agreement has been made with the State Lands Commission for the project to proceed without prejudice to that determination.

5. Prejudice Public Rights

The applicant shall, by accepting the terms and conditions of the permit, agree that the issuance of this permit and completion of the authorized development shall not prejudice any subsequent assertion of a public right, e.g. prescriptive rights, public trust, etc.

## III. FINDINGS AND DECLARATIONS

### 1. PROJECT AND SITE DESCRIPTION

a. *The project is the enlargement of an existing rubblemound seawall.* It is located at Sandyland Cove, a 38 unit locked-gate beachfront subdivision seaward of Del Mar Avenue, just west of the City of Carpinteria. (Exhibit 1) The project includes a 12 to 16 foot seaward extension of the existing revetment and a 3-4 foot extension in seawall height as the result of addition of 37,400 tons of 4 to 6 ton rock. (Exhibit IV) The project includes addition of

approximately 9300 quarry rocks with typical diameters of 4 to 6 feet along the entire 2550 foot length of Sandyland Cove beach. (Exhibit III) The resulting revetment has a 50 foot base rising in a 2:1 slope to a maximum height of +16 feet (MSL).

Sandyland cove is the sandy oceanfront beach of the eastern sandpit separating El Estero, the Carpinteria marsh, from the Pacific. The beach varies from a typical width of 40 feet in summer months to as narrow as 5 feet during high winter tides.

An existing rubblemound seawall separates the beach from the 38 unit Sandyland Cove subdivision developed on the sandpit. This existing revetment, located on the average 40 feet seaward of the subdivision's residences, is composed of 1 to 3 ton rock. It has an approximately 18 foot base and rises on a 2:1 slope to a height of 10 feet (MSL). This seawall was constructed in the 1950's replacing the most seaward portion of the sand dunes that once lined the inland extent of the Sandyland Cove beach.

The Sandyland Cove beach is the western extension of the 1.2 miles of beach which stretches from Sand Point at the inlet of El Estero to Asphaltum, a headland located downcoast of Carpinteria State Beach (Exhibit II). The beach includes Carpinteria's City beach, a 1600 foot long municipal beach located just east of Sandyland Cove, and 3000 linear feet of beachfront at Carpinteria State beach.

b. *The project site is an important public recreation area.* Sandyland Cove and the adjacent City and State beachfronts are intensively used as a visitor destination point and as a major recreational resource for local inhabitants. In 1983, over 425,000 recreational visits were recorded at

the State beach. Thousands more visited the City beach. These visitors were both local residents and vacationers. Visitors enjoy swimming, sunbathing, and active beach sports (volley ball) on the broad downcoast beaches. In contrast, the Sandyland Cove beach provides an opportunity to sit, jog, or stroll along a quiet shoreline away from the more intense beach activity occurring at the adjacent public parks. According to Santa Barbara County's negative declaration on the project, the beach "when it is exposed, is used by joggers and strollers." Offers of dedication for public access along the beach seaward of the pre-existing revetment have been recorded on four of the parcels along Sandyland Cove.

Recreational use of the beach area is supported by public accessways at Ash Street, Linden Avenue, and through the State beach. Tent and recreational vehicle camping at Carpinteria State Beach provides opportunities for low-cost overnight visits to the area. The City of Carpinteria's Local Coastal Program proposes additional access improvements at Ash Street, which terminates at the downcoast end of Sandyland Cove beach. These are the only fully accessible beaches (with road access, public parking, and commercial support facilities) in the 6 mile stretch from Summerland on the west to Rincon on the east.

According to the Department of Parks & Recreation's PARIS projections demand for recreational beach use in the project area is projected to increase 20% between 1980 and 2000.

2. SANTA BARBARA COUNTY'S LAND USE PLAN REQUIRES CAREFUL PROTECTION OF PUBLIC ACCESS AND RECREATION ON COASTAL BEACHES.

The County's land use plan's policies in Sections 3-1, 3-2, 7-1, and 7-2 (See Exhibit 5) require that: shoreline protective devices be permitted only when principal structures are endangered; that those permitted be the least environmentally damaging alternative; and that adequate provision be made for lateral beach access (3-1); that lateral beach access not be blocked (3-2); that the County take all necessary steps to protect and defend the public's constitutionally guaranteed rights of access to and along the shoreline (7-1); and that for all new development between the first public road and the ocean, granting of lateral easements to allow for public access along the shoreline shall be mandatory (7-3). These policies are discussed in detail below.

3. THE PROJECT IS INCONSISTENT WITH THE COUNTY'S LAND USE PLAN

a. *Public Access.* The project will reduce and block existing lateral beach access. Because the project has already been constructed, its initial effects on public access and recreation are evident. The proposed revetment will extend across 12 to 16 feet of sandy beach seaward of the pre-existing seawall. During fall, winter and spring months this extension will completely block public access along the Sandyland Cove beach during much of the day eliminating access to 40 percent of the Carpinteria area shoreline. For example, at 12 noon on October 17, 1984, 3

hours before high tide, the revetment was already awash by incoming waves and lateral movement along the beach was not possible. In summer months, the project will displace approximately 1 acre of sandy beach previously used for recreation. The City of Carpinteria has testified that the project has effectively reduced the amount of time the Sandyland Cove beach is available for public access. Carpinteria beach users report that even during summer months, the revetment blocks access to the western third of Sandyland Cove beach under most tidal conditions. Since the beach is often narrow, the area displaced is that portion of beach at the toe of the old revetment which was most heavily used by the public. These adverse effects of the project on public access have been confirmed by testimony of Mr. Don Risdon and Mr. Dan Baker, Carpinteria residents. The revetment will cover areas previously offered to the public for public access and recreation.

There is substantial evidence at the site and in the project file that the revetment may have been constructed at least partially on state tidelands. The County's review of the project relied in part upon the applicant's submittal of plans showing a 1964 MHT line considerably seaward of where the actual beach condition over recent years would indicate that line to be. Reliance on the submittal led to an inaccurate conclusion that public access along the beach would not be adversely affected (83-ND-62) even though the applicant's engineer, in a letter of June 24, 1983 acknowledged that the accuracy of the 1964 line was unknown, a note on the plans indicated that the contractor could eliminate a design element of the project in areas where beach access was not available because of

high water, and the applicant's plans showed the toe of the preexisting seawall located at -1.59 feet to +3.5 feet MSL, elevations at which much of the beach seaward of the revetment would be covered by water under higher tide conditions. In addition, the project as described by the County's negative declaration is one which would extend only 5 feet seaward of the old revetment (page 2) rather than the 12 to 16 feet seaward extension shown on the approved project plans. This erroneous description of the revetment's seaward extension plus the reliance upon the outdated MHT survey line have resulted in a failure to recognize that the revetment may have actually encroached upon state tidelands. The construction of developments which block access across state tidelands is inconsistent with PRC 30210 and 30211.

*Article X, Section 4 of the California Constitution* reads as follows:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people.

Section 3-2 of the County's LUP provides, in part, that:

> "Revetments, groins, cliff retaining walls, pipelines and out-falls, and other such construction that may alter natural shoreline processes

*shall be permitted when designed to . . . so as not to block lateral beach access.* (emphasis added).

In addition, Section 3-1 requires in part:

> Adequate provision for access shall be made [in seawalls].

Section 7-1 of the County's LUP provides:

> The County shall take all necessary steps to protect and defend the public's constitutionally guaranteed rights of access to and along the shoreline. At a minimum, County actions shall include:
>
> a) Initiating legal action to acquire easements to beaches and access corridors for which prescriptive rights exist consistent with the availability of staff and funds.
>
> b) Accepting offers of dedication which will increase opportunities for public access and recreation consistent with the County's ability to assume liability and maintenance costs.
>
> c) Actively seeking other public or private agencies to accept offers of dedications, having them assume liability and maintenance responsibilities, and allowing such agencies to initiate legal action to pursue beach access.

Finally, Coastal Act Sections 30210 and 30211 provide:

> Section 30210.
>
> In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public

rights, rights of private property owners, and natural resource areas from overuse.

(Amended by Ch. 1075, Stats. 1978.)

Section 30211.

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

The project as proposed is inconsistent with these policies.

As described above, the project will block and reduce public access along the Sandyland Cove beach, reducing opportunities for public recreation on the increasingly popular Carpinteria oceanfront. Because of these effects, the project is inconsistent with the requirements of the land use plan that revetments not block lateral beach access and that seawalls include adequate provision for access. The project will also eliminate access to State tidelands and areas historically used by the public, including areas offered for dedication for public access. For these reasons, the project is inconsistent with Coastal Act Sections 30210 and 30211.

The conditions of approval require the applicant to provide a trail along the revetment and staircases to the beach. The trail and staircase would replace existing beachfront access blocked by the revetment and permit continuous public access along the shoreline and to the beach and State tidelands. The conditions also require coordination with the State Lands Division to ensure that

the project does not illegally encroach on State tidelands. With these conditions, the project conforms to the public access policies of the LCP and Chapter 3 of the Coastal Act.

b. *The project may adversely affect sand supplies to adjacent public beaches.* As described above, the Sandyland Cove shoreline is part of a larger beach extending from Sand Point on the west to the headlands at Asphaltum on the east. According to the *City of Carpinteria Beach Erosion and Pier Study* (Ballard and Jenkins, 1982), sand transport along this beach system is from west (the project site) to east (the City and State beaches). The City's report found that the municipal beach is subject to the same tide and wave influences as the project site and the State beach but, due to angles of wave refraction and nearshore bottom conditions, the City beach maintains a higher beach profile and erodes less than beaches to the west and east.

> The proposed project may alter the shoreline processes identified in the City's beach study. That shoreline structures, including rock revetments, have adverse impacts on the shoreline is accepted among experts in the field of coastal engineering and geology. In *Saving the American Beach: A Position Paper by Concerned Coastal Geologists* (March 1981) which was signed by 94 experts in the field of coastal geology, it is stated. . . .
>
> > These structures are fixed in space and represent considerable effort and expense to construct and maintain. They are designed for as long a life as possible and hence are not easily moved or replaced. They become permanent fixtures in our coastal scenery

> but their performance is poor in protecting community and municipalities from beach retreat and destruction. Even more damaging is the fact that these shoreline defense structures frequently enhance erosion by reducing beach width, steepening offshore gradients, and increasing wave heights. As a result, they seriously degrade the environment and eventually help to destroy the areas they were designed to protect.

Structures such as the one proposed will have an impact on the site and the adjoining area. As stated in a publication by the State Department of Boating and Waterways (formerly called Navigation and Ocean Development), *Shore Protection in California* (1976),

> While seawalls may protect the upland, they do not hold or protect the beach which is the greatest asset of shorefront property. In some cases, the seawall may be detrimental to the beach in that the downward forces of water, created by the waves striking the wall, rapidly remove sand from the beach.

This impact is reiterated in the paper, "Economic Profiling of Beach Fills" by Herman Christiansen which is contained in the proceedings of *Coastal Sediments '77* (November 1977). It states:

> Observations at some of the investigated beaches have shown that an optimal profile becomes instable, if structures, such as rocks, groins, revetments, piles, stairs, etc., are placed within the wave action zone of a beach. Steady erosions, caused by complex high turbulent surf currents, lead to heavy sand losses.

Although they do not have as great an impact as smooth, vertical seawalls, rock revetments have effects on the beach sand in front of and around the structure. A rock seawall operates on the principal [sic] that the wave's energy is dissipated within the voids of the wall, therefore producing less reflected wave energy. However, the rock seawall will still reflect enough energy to change the beach profile, steepen the beach, and cause accelerated erosion of the downcoast area. One mechanism that accounts for rock walls' impact on beaches is stated in "The Role of Wave Reflection in Coastal Processes" in *Coastal Sediments '77* by Richard Silvester:

> Rubble-mound structures can reflect long period wave components with little dissipation and hence short-crested phenomena in front of and downcoast from them should be considered in design and maintenance.

Moreover, the literature on coastal engineering repeatedly warns that unprotected properties adjacent to the seawall may experience increased erosion. A rock wall invariably protrudes seaward from development which exacerbates this situation. Actual field observations have verified this concern. (See for example the 1981 paper by Gerald G. Kuhn of the Scripps Institution of Oceanography entitled "Coastal Erosion along Oceanside Littoral Call, San Diego County, California". In this paper, it is written and pictorally [sic] illustrated that erosion on properties adjacent to rock seawall is intensified when wave run-up is high.)

These impacts can be expected at the project site. The existing Sandyland Cove beach is

already narrow and more transient than adjacent public beaches, due in part to adverse effects of the pre-existing revetment along the beach. Such changes in shoreline processes could adversely effect Carpinteria's City beach and Carpinteria state beach, reducing the area available for coastal access and recreation at these public facilities.

The project may also interfere directly with shoreline sand supply to these downcoast beaches. This impact is highly probable if past erosion trends along Sandyland Cove persist. According to the *City of Carpinteria Beach Erosion and Pier Study*, the shoreline at the project site has retreated by up to 500 feet at Sand Point, the western end of the project site, since 1938 and by 90 feet at the City beach since the 1970's. As described above, the project's effects can be expected to maintain or increase this shoreline erosion.

Based on these historic erosion rates whatever beach normally exists in the winter and spring seaward of the proposed revetment can be expected to be eliminated. In this event, the proposed seawall will extend into the surf zone beginning in late summer and extending through spring. Under these circumstances, the proposed revetment would act as a groin which retards downcoast sand acretion [sic] on the City and State beaches. The result may be that the average profile of those beaches even in summer is reduced with a related increase in beach erosion during winter.

Neither the County's hearing record nor the applicant's submittal includes information

assessing these potential project effects on adjacent beaches. The present shoreline conditions at Carpinteria, however, provide indications of the project's adverse effects. Beach erosion is particularly evident immediately downcoast of the revetment. During a site visit on November 8th, for example, the public beach immediately downcoast of the project at Ash Street was only about half the width of the beach at Holly and Elm Streets further downcoast from the site. Historic maps indicate a relatively uniform width of beach had existed throughout this area. In addition, exposed cobble rock, an indicator of sand erosion, was much more prevelent [sic] on the beach at Ash Street than at Holly and Elm Streets. The City of Carpinteria has expressed concern that the revetment may have increased shoreline erosion at Ash Street.

Policy 3-2 of the County's Land Use Plan provides, in part:

> "Revetments . . . and other such construction that may alter natural shoreline processes shall be permitted when designed to eliminate or mitigate adverse effects on local shoreline sand supply . . . "

As described above, the project will have adverse effects on shoreline sand supply at both the project site and at adjacent City and State beaches. The project includes no measures such as contributions to a sand replenishment program, to eliminate or mitigate these adverse impacts.

c. *Feasible alternatives are available to reduce the project's effects on public access, but not its effects on shoreline sand supply.* While the presence of the existing revetment limits some design

options, it is possible to augment the existing wall in a manner which reduces the project effects on public access and shoreline sand supply. These alternatives include:

i. Move the enlarged revetment landward so that its toe encroaches no further seaward than the toe of the old revetment. This would require realignment of portions of the old wall and a reduction of rear yard space for the residences. There is sufficient room on most parcels to move the wall landward as can be seen by the large splash feature on the project plans (Exhibits III and IV) and the substantial rear yards behind the old wall on each parcel.

ii. Augment the old wall only where necessary with 4 to 6 ton rock. This is the typical method of re-fitting existing rock revetments. It requires a greater degree of maintenance activity over time but "spot additions" to these revetments combined with "re-keying" rocks when necessary would eliminate the need for significant seaward encroachments which permanently block access and alter littoral processes.

iii. Augment the old revetment as in ii above but add a splash feature behind as shown on the project plans. Splash protection could also be afforded by placing larger rocks atop of or behind the wall to break-up ovetopping waves. This has been done to the west along Padaro Lane.

iv. Restore beaches seaward of the revetment with sand bypassed from the Santa Barbara harbor or from sediment basins tributory to the coast. Such beach restoration has been suggested as a component of regional erosion hazard reduction by the City of Carpinteria's Beach

Erosion Need Assessment (1984), but no such program is presently operating.

v. Retain the present seawall location and provide for public access along it to the beach.

The County's LCP requires consideration and selection of alternatives which prevent or minimize impacts on coastal access, shoreline sand supplies, and natural landforms. Section 3-1 of the LCP requires:

> Seawalls shall not be permitted unless the County has determined that there are no other less environmentally damaging alternatives reasonably available for protection of existing principal structures. The County prefers and encourages non-structural solutions to shoreline erosion problems, including beach replenishment, removal of endangered structures and prevention of land divisions on shoreline property subject to erosion; and, will seek solutions to shoreline hazards on a larger geographic basis than a single lot circumstance. Where permitted, seawall design and construction shall respect to the degree possible natural landforms.

As noted above, the alternative of siting the new revetment so that its toe is not located seaward of the existing seawall is an alternative that would eliminate the project's adverse effects on public access, the beach natural landform and shoreline processes. Because the new revetment's seaward toe would be coterminous with the existing seawall, it would not block existing access along the beach. Impacts on shoreline processes would be no greater than those caused by the existing revetment. The natural landform

of the El Estero sandspit's beachfront would be maintained in its present condition.

Relocation of the seawall, which has already been constructed under an emergency permit, is not feasible. The Coastal Act defines feasible as:

> "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.

On five downcoast parcels adjacent to Ash Street, there is insufficient area to relocate the wall consistent with protection of the residences. The existing seawall location on these parcels would need to be retained even if the seawall could be moved inland on other upcoast parcels. Because the seawall's potential adverse effects on the City beach at Ash Street are largely determined by the wall's configuration on these adjacent parcels, relocating other portions of the wall would not reduce the project's effects on shoreline sand supplies. In addition, it is estimated that the relocation of the seawall will cost approximately $300,500 (Frank Serena Sandyland Cove Homeowner), an average cost of $7,900 per homeowner. While such expenditures may be feasible, in this case the project's adverse effects on public access can be mitigated at less cost and with less disruption of existing development by providing access along the seawall and to the beach as required by the conditions of approval.

The conditions require the applicant's assumption of liability for hazards associated with the revetment and for the structure's maintenance. They also prohibit borrow of shoreline sand for

seawall construction or landscaping, an activity annually carried out at the site in the past which reduces the sand available for beach maintenance. The conditions permit deferral of accessway construction until May, 1985 to protect against damage by potential winter storms.

As conditioned, the project will conform to Santa Barbara County's LCP by selecting an alternative which provides public access to and along the coast. The prohibition of using shoreline sand supply to cosmetically cover the revetment will allow more sand to remain in the sand budget. Further mitigation of impacts on sand supplies is not feasible because of the location of existing development at Sandyland Cove. As conditioned, the project is the least damaging feasible alternative and has been designed to eliminate or minimize effects on shoreline sand supplies, in conformance with the County's LCP.

4. Public Access

The project is located between the ocean and Carpinteria Avenue, the first public road paralleling the sea in this portion of Santa Barbara County.

Section 7-3 of the County's LUP requires:

> *For all new development** between the first public road and the ocean, *granting of lateral easements to allow for public access along the shoreline shall be mandatory.* In coastal areas, where the bluffs exceed five feet in height, all beach seaward of the base of the bluff shall be dedicated. In coastal areas where the bluffs are less than five feet, the area to

be dedicated shall be determined by County, based on findings reflecting historic use, existing and future public recreational needs, and coastal resource protection. At a minimum, the dedicated easement shall be adequate to allow for lateral access during periods of high tide. In no case shall the dedicated easement be required to be closer than 10 feet to a residential structure. In addition, all fences, no trespassing signs, and other obstructions that may limit public lateral access shall be removed as a condition of development approval (emphasis added)

*Policies 7-2 and 7-3 shall not apply to developments excluded from the public access requirements of the Coastal Act by PRC 30212 or to development incidental to an existing use on the site.

In addition, Coastal Act Section 30604(c) requires that every coastal development permit for a project located between the sea and the first parallel public highway be consistent with the Act's policies on public access and recreation. Section 30212 of these policies, which is referenced in the County LUP, provides, in part:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or

(3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not a seaward of the location of the former structure.

> (5) Any repair or maintenance activity for which the Commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the Commission determines that the activity will have an adverse impact on lateral public access along the beach.
>
> As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

As proposed and constructed, the project is not a development excluded from the access dedication requirements of this Coastal Act section nor is it an incidental use as defined in the County LCP. This project is not the simple reconstruction or repair of a seawall as described in Subsection 30212(b4), but rather a significant enlargement of the existing revetment. The project would be located seaward of the existing seawall and would result in substantial enlargement of the structure's size. The proposed revetment is more than 50 percent larger in bulk, 100 percent wider and 30 percent higher than the pre-existing seawall. Such significant enlargement is not reconstruction or repair as defined by Subsection 30212(b4). During local hearings on the plan, the County Counsel expressed a similar opinion that the project was not repair, but construction of a new seawall. Similarly, the project is not a repair and maintenance activity as described by Subsection 30212(b5). Because the project proposed will result in an increase in bulk of more than 10% over the pre-existing revetment it is not excluded from access dedication requirements by Subsection 30212(b3). The provisions of subsection 30212(b1) do not

apply because the pre-existing structure was not destroyed by natural disaster.

Because the project is not excluded from the access requirements of Coastal Act Section 30212, an offer of dedication of public access would be required pursuant to the access and recreation policies of the County's LCP and Chapter 3 of the Coastal Act. In its approval of the project the county did not require the provision of an access easement.

Because the revetment will encroach seaward of the toe of the old revetment, it is not excluded from the Coastal Act's access dedication requirement. For this reason, the conditions of permit approval require an offer of dedication for public access along the beach seaward of the new revetment.

Dedication of this easement is necessary to balance the project's adverse effects on public access with the benefits provided to the applicant. The project's adverse effects on public access have been described above. In addition, the Commission notes that on all beachfront property the boundary between publicly-owned tidelands and privately-owned land is dynamic, varying during each year and over the years. In many sections of the coast, the natural processes would involve expansion of publicly-owned tidelands as erosion progresses inland. In any case where permission to construct a seawall is sought, the applicant seeks to halt the natural processes and fix the boundary between the land and the sea. Implicit, however, in fixing the boundary between the land and the sea is some resolution of the boundary between the publicly-owned land the privately-owned land. If the boundary

between the sea and the land is established at the toe of a revetment, the boundary between the publicly-owned land the privately-owned land should also be established at the toe of the revetment.

The Commission finds that requiring access to the toe of the revetment is not unreasonable generally in case of seawalls and is particularly reasonable in the subject applications. Seawalls adversely affect shoreline processes and public access. Requiring access in exchange for these adverse effects is a reasonable balancing of public and private rights. As conditioned, the project conforms to Coastal Act Section 30214 and the County's LCP.

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# APPENDIX F

## CALIFORNIA COASTAL COMMISSION

**631 Howard Street, San Francisco 94105 – (415) 543-8555**

EXCERPT FROM: 3/11/85

TO: ALL COMMISSIONERS

FROM: MICHAEL L. FISCHER, EXECUTIVE DIRECTOR, STATE COMMISSION

SUBJECT: MINUTES OF STATE COMMISSION OF JANUARY 22-25, 1985

Tuesday, January 22, 1985 (Pages 1 to 7)

1. *CALL TO ORDER.* The meeting of the California Coastal Commission was called to order at 10:00 a.m. on Tuesday, January 22, 1985, at the City Council Chambers, 505 Forest Avenue, Laguna Beach, California, by Chairman Melvin Nutter.

2. *ROLL CALL.* Present: Chairman Nutter, Vice Chairman McNeil, Commissioners (Alternate) McCarthy, Grossman, King, MacElvaine, Malcolm, McInnis, McMurray, Shipp, Wornum, Wright and Sanders. Absent: Diemer and Snow.

* * *

19. *RECONSIDERATION.*

a. *No. A-4-STB-84-58-R (Sandyland Cove,* Santa Barbara County) Staff recommended that the Commission deny the request for reconsideration.

Carl Hetrick, representing applicant, spoke in favor of the reconsideration while Donald Risdon, representing

Concerned Citizens of Carpinteria, spoke in favor of the staff recommendation of denial, as did Charles Restivo and A. P. Salzgeber, representing Carpinteria's World's Safest Beach Protection Association.

*MOTION AND VOTE:* McInnis moved the Commission grant the reconsideration request, seconded by McMurray, and the roll call vote was 4 in favor (MacElvaine, McInnis, Shipp & Wornum) and 8 opposed. *FAILED.*

* * *

SUPREME COURT, U.S.
FILED
MAR 1 1 1993
OFFICE OF THE CLERK

No. 92-1261

**In The**

**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1992

---

GARY ANTOINE, ET AL.,
*Petitioners,*

vs.

CALIFORNIA COASTAL COMMISSION,
*Respondent.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX*

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

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No. 92-1261

**In The**

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OCTOBER TERM, 1992

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GARY ANTOINE, ET AL.,
*Petitioners,*

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*Respondent.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX*

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

## OPINIONS BELOW

The decision of the California Court of Appeal, Pet. App. A, is not reported.

## JURISDICTION

1. No jurisdiction exists under 28 U.S.C. § 1257 regarding any of the questions presented because there is no final judgment below. The California Court of Appeal reversed the trial court judgment with instructions to remand to the California Coastal Commission for further proceedings. Pet., p. 15; Pet. App. A, pp. 2, 15-16, 24. Before the Coastal Commission, petitioners will have the opportunity to present further evidence in

support of their contention that the seawall rests entirely on private property. *Ibid.*

2. Petitioners have not complied with Rule 14.1(h). That rule requires, where review of a state court judgment is sought, that the petition set forth facts showing that the federal questions were timely and properly raised in the state courts. Questions 2, 3, and 4 were not timely and properly raised in the state courts. Accordingly, no jurisdiction exists to consider these questions.

3. Questions 4 and 5 are solely questions of state law, and present no federal question for decision by this Court.

## ADDITIONAL STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article X, section 4 of the California Constitution, which provides:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

2. Section 670 of the California Civil Code, which provides:

> "The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State . . . ."

3. The following sections from the California Coastal

Act, which provide in pertinent part as follows:

California Public Resources Code section 30210:

"In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of property owners, and natural resource areas from overuse."

California Public Resources Code section 30211:

"Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."

California Public Resources Code section 30212:

"(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where [exceptions listed]. . . .

"(b) For purposes of this section, 'new development' does not include:

". . . . . .

"(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not seaward of the location of the former structure.

". . . . . .

"(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution."

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. ON VARIOUS GROUNDS, NO JURISDICTION EXISTS UNDER 28 U.S.C. § 1257

#### A. There Is No Final Judgment

There must be a "final judgment" before there can be review on certiorari under 28 U.S.C. § 1257. To be reviewable, a state court judgment

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945).

There is a lack of finality where a state court remands to an administrative agency for further proceedings. *Laclede Gas Co.* v. *Public Service Commission*, 304 U.S. 398 (1938); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69-72 (1948).

In *Laclede*, *supra*, this Court was asked to review a judgment of the Supreme Court of Missouri that had affirmed a lower court decision, but also ordered the lower court to remand to the Missouri Public Service Commission for reexamination of certain questions of fact regarding valuation of property for ratemaking purposes. On its motion to dismiss the appeal, the Public Service Commission argued that new evidence on remand could result in a different finding of "fair value," as well as new findings concerning various allowances for depreciation and amortization of costs, thus presenting the basis for another appeal. This Court agreed that the state court had not finally disposed of the controversy, and dismissed the appeal.

A like situation exists here. Apparently on the basis that the homeowners and the Sandyland Cove Homeowners Association (hereafter jointly referred to as "Sandyland") may not have appreciated that they had the burden to establish that their project rested entirely on their own property, the Court of Appeal thought it "only fair to give Sandyland the opportunity to present further evidence to the Commission." Pet. App. A, pp. 15-16. Accordingly, the Court of Appeal reversed the trial court judgment with instructions to remand to the Commission for further proceedings. Pet. App. A, pp. 2, 24. The Court commented that, on remand, "Sandyland may be able to show the seawall lies entirely on private land . . . ." Pet. App. A, p. 24.

Presented with new evidence, the Commission may determine that the seawall rests entirely on Sandyland's property. But even should the Commission decide, in light of new evidence, that the seawall intrudes onto tidelands, the nature and extent of the new evidence and the content of the Commission' new decision might well present new issues for review or alter those that Sandyland offers for review at this time. In these circumstances, there is no final judgment. See also *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 120-127 (1981); *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U.S. 251, 255-257 (1917) (state supreme court decision on constitutionality of condemnation by private company not final judgment because damages yet to be ascertained in trial court); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 633-634 (1981); cf. *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) (even where jurisdiction exists, prudential considerations may make it desirable to "wait and see"). None of the special circumstances are present here that occasionally prompt departure from the rule that interlocutory judgments are not final judgments. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485

(1975). To paraphrase Chief Justice Rehnquist's statement in joining the Court's opinion dismissing the appeal in *San Diego Gas & Electric, supra,* the Court "would [be] much better able to formulate federal constitutional principles . . . if [it] knew what disposition the California courts finally made of this case." 450 U.S. at p. 636.

**B. Questions 2, 3, and 4 Were Not Timely and Properly Raised Below**

This Court lacks jurisdiction to consider a federal question under 28 U.S.C. § 1257 unless that question was raised and decided below. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). In considering whether a federal question was timely raised in a state court, state rules concerning the timeliness of issue presentation are determinative; and if state rules prohibit consideration of an issue because it was not timely raised, this Court may not consider the issue. See *Beck* v. *Washington*, 369 U.S. 541, 550-553 (1962); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952) (no jurisdiction where question was not timely raised under state practice because broached for the first time in a petition for rehearing in the intermediate state appellate court).

Question 2, pertaining to petitioners' assertion that the Court of Appeal "took" their property by allegedly "redefining the boundary" between private property and public tidelands, was raised for the first time in the petition for certiorari. It could and should have been raised before the Commission itself, see *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), and certainly should have been raised in the trial court, since that court would necessarily have been called upon, in petitioners' words, to "sanction the Coastal Commission's physical invasion of private property" by accepting the Commission's interpretation of California tidal boundary

law. Pet., p. i. Accordingly, there is no jurisdiction to consider this question.

The same is true of Question 3, pertaining to petitioners' argument that, regarding those homeowners whose respective segments of the seawall may not rest on state tidelands, there was no sufficient nexus to allow imposition of the access conditions as against them. This question, too, was raised for the first time in the petition for certiorari; neither the Commission nor any of the three state courts below have had an opportunity to consider it.

Question 4 concerns allocation of the "burden of proof" regarding the propriety of access easements required as conditions of land use permit approvals. This issue is distinct from the issue of the burden of proof regarding essential facts that establish entitlement to issuance of a land use permit. This latter question was timely put in issue. This new issue, however, relates not to proof of factual matters, but instead to the legal question of what are permissible conditions once the facts have been established. It was raised for the first time on petition for rehearing following the decision of the Court of Appeal. See Pet. for Rehearing, pp. 7-8. As such, it was not timely raised. *People ex. rel. Dept. of Public Works* v. *Mascotti*, 206 Cal.App.2d 772, 779-780, 23 Cal.Rptr. 846 (1962) ("It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered."). Neither will the state supreme court on petition for review consider a question that was raised for the first time in a petition for rehearing in the court of appeal. *Flores* v. *Stone*, 21 Cal.App. 105, 111, 131 P. 348 (1913) (statement by state supreme court on denial of petition for hearing after decision by the court of appeal).

### C. Questions 4 and 5 Involve Matters That Are Solely Questions of State Law

Question 4 does not really concern the burden of proof, but rather whether, given the facts that have been established, sufficient nexus as a matter of law has been established between the adverse impacts of a project and conditions purportedly responsive to those impacts. But accepting petitioners' characterization that the question pertains to the "burden of proof," the allocation of the burden of proof in state land use proceedings is a matter of state law. Under California law, the burden of proof in a land use permit proceeding is upon the applicant. *Smith* v. *County of Los Angeles*, 211 Cal.App.3d 188, 203, 259 Cal.Rptr. 231 (1989); see *Reed* v. *California Coastal Zone Conservation Com.*, 55 Cal.App.3d 889, 895, 127 Cal.Rptr. 786 (1975); Cal. Pub. Resources Code, § 30601.5 (requiring permit applicants to demonstrate a legal right to use the property for their proposed development). No federal question is presented.

Nor does Question 5 involve a federal question. Here, petitioners argue that, as a matter of federal constitutional law, state courts must unilaterally strike invalid permit conditions and order issuance of permits as judicially modified, without remanding to the land use agency for reconsideration of its decision in light of the court's decision. The degree of deference that courts must afford administrative adjudications is peculiarly for the courts and the legislature of a State to determine. In California, courts assure that administrative agencies act within the range of reasonable discretion, but they are not allowed to substitute their own discretion for that of the agency whose decision is under review. California Code of Civil Procedure section 1094.5, subdivision (f), provides that a court, in setting aside an administrative decision, "may order [the agency] to take such further action as is specially enjoined upon it by law but

the judgment shall not limit or control in any way the discretion legally vested in the [agency]." California courts have confirmed that a writ of mandamus cannot compel the performance of an act by an agency in any particular manner, and that a court may not substitute its discretion for that of the administrative agency. See, e.g., *Bank of America* v. *State Water Resources Control Bd.*, 42 Cal.App.3d 198, 214-215, 116 Cal.Rptr. 770 (1974); *Bowles* v. *Antonetti*, 241 Cal.App.2d 283, 286-287, 50 Cal.Rptr. 370 (1966); compare *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. . . .").

## II. CERTAIN OF PETITIONERS' CONTENTIONS ARE PREMISED ON THE UNTENABLE ASSERTION THAT "THE ONLY CREDIBLE EVIDENCE" ESTABLISHED THAT THE SEAWALL WAS BUILT ENTIRELY ON PRIVATE PROPERTY

Certain of petitioners' arguments are premised on their assertion that "the only credible evidence before the Commission at the time of hearing established that the seawall was not located on state tidelands and therefore does not block lateral beach access." Pet., p. 29; and see Pet., pp. i, 20. The record is otherwise.

The new seawall project was not merely an "improvement" of the existing seawall. It was a new structure. It consisted of some 9,300 quarry rocks, four to six feet in diameter, and weighing four to six tons apiece. Pet. App. E, pp. 6-7. 37,400 tons of rock were to be placed along the full 2,550 length of the beach. *Ibid.* Whereas the old seawall was 18 feet wide at the base and rose 10 feet above mean sea level, the new seawall was 50 feet wide at the base and rose 16 feet

above mean sea level. Pet. App. E, p. 7. The new wall extended 12 to 16 feet farther seaward than the old one. Pet. App. A, pp. 2, 4, 5, 14-15; Pet. App. E, pp. 6, 9.

There was various testimonial and documentary evidence before the Commission concerning the new seawall's location in relation to the mean high tide line and the effect of the wall on preexisting public access along the beach. Portions of the toe of the old seawall were in the surf zone, and the new wall was 12 to 16 feet farther seaward. Pet. App. A, pp. 2, 4, 5, 14-15. One witness testified that the wall blocked beach access to the slough mouth at Sandyland Point that had been available prior to the wall's construction. Joint Appendix (J.A.) in the Court of Appeal, p. 837. Another witness testified that at high tide the water came up as much as three feet on the rocks of the revetment. J.A. 833. Coastal staff members had observed the revetment awash a full three hours before the time of high tide, and testified that lateral movement along the beach was impossible at that time. Pet. App. E, pp. 9-10. Numerous photographs showed the revetment awash, and there was testimony that these photos accurately reflected conditions during the late fall, winter, and spring. Pet. App. A, p. 3. There was testimony from beach users that, even during the summer months, when the beach is wider, the new seawall blocked access along the western one-third of the beach under most tidal conditions. Pet. App. E, p. 10. Sandyland's own plans showed pre-construction topography in relation to the toe of the new wall, and demonstrated that the wall intruded seaward of the mean high tide line by as much as 14 feet as of the date of the survey. See J.A., pp. 34, 36-38, 105, 830, 1891; Apps. I, J, Appendices to Brief of *Amicus Curiae*, State Lands Commission. The plans for the new wall showed the toe of the new structure lying at elevations

between −1.59 feet and +3.5 feet above mean sea level. Pet. App. E, p. 11. Mean sea level is below the plane of mean high tide. See J.A. 34, 105, 1891; 2 Shalowitz, Shore and Sea Boundaries (1964), pp. 62-66. The intersection of the plane of mean high tide with the shore defines the mean high tide line. See 1 Shalowitz, Shore and Sea Boundaries (1962), pp. 89-97. The plans also showed a plotting of a mean high tide line survey performed 20 years earlier by the State Lands Commission, which showed the mean high tide line some 60 to 90 feet waterward of its location as reflected in the topographic contours shown on Sandyland's plans for the project, dated February 1983. Pet. App. A, p. 4. The Bailard/Jenkins Report, prepared in April 1982 for the City of Carpenteria, established that long-term beach erosion in this area had taken place primarily during two periods, one of which was between 1961 and 1973, with most of the erosion taking place after 1964. J.A. 303-306.

From the foregoing review of the evidence, it is evident that petitioners may not legitimately premise their arguments upon the assertion that "the only credible evidence" established that the seawall was not built on state tidelands.

## III. THE PETITION DOES NOT PRESENT ANY ISSUES MERITING REVIEW BY THIS COURT

### A. Adherence to the Nexus Requirement of *Nollan* v. *California Coastal Commission* Does Not Require Abandonment of the Standards of Evidentiary Review That Are Commonly Applied to Administrative Decisions Under State Law

Sandyland interprets the Court of Appeal's application of the substantial evidence rule as a decision not to insist on a "substantial relationship" between the impacts of the new seawall and the access conditions

imposed by the Commission. Use of the substantial evidence rule, it argues, conflicts with the strict nexus requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987).

The "closeness of fit" between a project's impacts and the conditions imposed in purported response to those impacts is a question independent of the standard of evidentiary review that is applied by a reviewing court in assessing whether there is evidentiary support for the factual findings that establish whether the strict nexus requirement has been met. Here, there was evidence that the new seawall intruded onto state tidelands, thereby depriving the public of one of its principal benefits in property that is held in trust for its use: public access along the shore. The Commission responded with conditions that provided replacement lateral access. One can imagine no closer a connection between a burden caused by a project and conditions designed by the regulating agency to alleviate that burden.

Application of the substantial evidence test in no way vitiated or avoided the requirement of a "substantial relationship" between the burden and the offsetting condition. The substantial evidence test is routinely applied in land use application cases. See *Barrie* v. *California Coastal Commission*, 196 Cal.App.3d 8, 14-16, 241 Cal.Rptr. 477 (1987); *Whaler's Village Club* v. *California Coastal Commission*, 173 Cal.App.3d 240, 251, 218 Cal.Rptr. 122, cert. den. and appeal dism., 476 U.S. 1111 (1985); *Paoli* v. *California Coastal Commission*, 178 Cal.App.3d 544, 550-551, 223 Cal.Rptr. 792 (1986); *Surfside Colony, Ltd.* v. *California Coastal Commission*, 226 Cal.App.3d 1260, 1269, 277 Cal.Rptr. 371 (1991). The test requires the court to assess whether there is "substantial evidence in the light of the whole record," and to consider all relevant evidence, contradicted and uncontradicted. Cal. Code Civ. Proc., § 1094.5,

subd. (c); e.g., *LeVesque* v. *Workmen's Comp. App. Bd.*, 1 Cal.3d 627, 635-640, 83 Cal.Rptr. 208 (1979); *Apte* v. *Regents of the University of California*, 198 Cal.App.3d 1084, 1091, 244 Cal.Rptr. 312 (1988).

Contrary to petitioners' interpretation, there is nothing in this Court's opinion in *Nollan* that suggests that the Court was there taking upon itself the burden of conducting a *de novo* review of the evidence in local land use cases, thereby displacing application of well-established standards of evidentiary review regarding the factual findings of administrative agencies. Specifically, contrary to petitioners' representation, there was no review and rejection by the Court of the evidence concerning the location of the mean high tide line or the finding based on that evidence. The Commission did not there assert that the house was built on tidelands or offer that as a justification for the lateral access easement there at issue. Rather, the proximity of the fluctuating mean high tide line to the house, and the potential that increased private use of the beach by the residents would promote boundary disputes with members of the public, was offered as an alternative reason for the easement. In a brief discussion in footnote 6 of the opinion, only this proffered nexus was rejected; the Court did not engage in any analysis of the evidence.

### B. In Ruling on an Issue of Tidal Boundaries That Has Not Been Definitively Settled by the California Supreme Court, the Court of Appeal Did Not "Take" Sandyland's Property

Petitioners argue that the Court of Appeal, in determining that the state-private boundary along a sandy ocean beach fluctuates with seasonal changes in the location of the mean high tide line, "redefined" the boundary between private property and public tidelands under California law. They argue that the court's

decision was a "sudden change in state law, unpredictable in terms of relevant precedents," and therefore "took" their property without just compensation in violation of the Takings Clause and the Fourteenth Amendment.

This Court has repeatedly rejected the notion that judicial declarations of property rights can constitute "takings." *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450 (1924); *Central Land Co.* v. *Laidley*, 159 U.S. 103, 112 (1895); see *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680, 681, n. 8 (1930); *Great Northern Ry.* v. *Sunburst Co.*, 287 U.S. 365 (1932); but cf. *Muhlker* v. *New York & Harlem Railroad Co.*, 197 U.S. 544 (1905); *Demorest* v. *City Bank Co.*, 321 U.S. 36 (1944); *Fox River Paper Co.* v. *Railroad Commission*, 274 U.S. 271 (1927).

In any case, there is no application for such a theory here. The issue of the proper location of the state-private boundary along a sandy ocean beach where the mean high tide line fluctuates with the seasons has not been definitively ruled upon by the California Supreme Court. Nonetheless, the weight of precedent and the more persuasive arguments support the conclusion reached by the Court of Appeal in this case.

Under California law, "[t]he State is the owner of all land below tide water, and below the ordinary high-water mark, bordering upon tide water within the State . . . ." Cal. Civ. Code, § 670. It has long been the law in California that the tidal boundary between tidelands and private upland property is "a shifting boundary, going landward with erosion and waterward with accretion." *City of Oakland* v. *Buteau*, 180 Cal. 83, 87, 179 P. 170 (1919); accord, *Strand Improvement Co.* v. *Long Beach*, 173 Cal. 765, 772-773, 161 P. 975 (1916). Similarly, it is well-established that this tidal boundary is located at the mean high tide line, which is defined by the intersection with the profile of the shore of a plane

corresponding to the mean elevation of all high tides over a tidal epoch of 18.6 years. *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26-27 (1935); *City of Long Beach* v. *Mansell*, 3 Cal.3d 462, 478, n. 13, 91 Cal.Rptr. 23 (1970); *City of Berkeley* v. *Superior Court*, 26 Cal.3d 515, 519, n. 1, 162 Cal.Rptr. 327 (1980); but see *People* v. *Wm. Kent Estate Co.*, 242 Cal.App.2d 156, 161, 51 Cal.Rptr. 215 (1964) (concluding that only the high neap tides—those that occur twice a month as a result of the Moon, Earth and Sun forming a right angle—are to be averaged in calculating the plane of mean high tide). It has also long been recognized that the mean high tide line on a sandy beach shifts. See *Muchenberger* v. *City of Santa Monica*, 206 Cal. 635, 639, 642, 275 P. 803 (1929); *Swarzwald* v. *Cooley*, 39 Cal.App.2d 306, 313, 103 P.2d 580 (1940); *City of Los Angeles* v. *Borax Consolidated*, 102 F.2d 52, 56-57 (9th Cir. 1939).

However, it still has not been conclusively resolved in California how the general principles of littoral boundary change by erosion and accretion apply in the context of a sandy beach, where alternating seasonal erosion and accretion of beach sand caused by wave action result in shifting locations for the mean high tide line. The reported case closest in point, and the one which petitioners interpret as contrary to the Court of Appeal decision in this case, is another court of appeal decision, *People* v. *Wm. Kent Estate Co., supra*. But contrary to what petitioners argue, *Kent* did not definitively resolve the issue of how the tidal boundary is to be located on a sandy beach. The court there was clearly uncomfortable with a boundary line that wasn't fixed, probably because it was being asked to enjoin maintenance of a fence that was allegedly built on tidelands, and a shifting boundary could present obvious difficulties with enforcement. See 242 Cal.App.2d 156, 161 (If the line could not be fixed with reasonable certainty on retrial, "the trial court should consider whether the uncertainty

is so great as to warrant denial of injunctive relief . . . ."). But the *Kent* court merely suggested that it might be possible to fix some type of average line, *if* it could be established on retrial that the annual summer-to-winter changes in the position of the mean high tide line were "constant, in offsetting pairs occurring annually." *Id.*, at p. 160. *If* the changes were substantially the same distance each year, the court speculated, that might "[afford] a basis for fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line." *Id.*, at pp. 160-161. Upon retrial, it developed that no such neatly predictable average occurred in nature; the changes were not uniform from year to year. See App. C, Appendices to Brief of *Amicus Curiae*, State Lands Commission: Graber & Thompson, *The Issues and Problems of Defining Property Boundaries on Tidal Waters in California*, p. 23, and see *id.*, App. A, p. 30. It is therefore simply not the case, contrary to petitioners' representations, that *Kent* established that the state-private tidal boundary along a sandy beach is a fixed line based on an "average" profile of the beach.

It was this body of precedent that the Court of Appeal had before it when the issue of tidal boundary location on sandy beaches came before it in this case. The Court concluded that the boundary between state and private ownership along sandy ocean beaches was the mean high tide line; that the mean high tide line moved with changes in the profile of the shore; and that the boundary moved with it. It rejected Sandyland's argument that the boundary had to be fixed at some "average" location of the mean high tide line, as well as the State's contention that the boundary should be fixed at the location of the mean high tide line when the beach is in its most landward or "winter" profile:

> "Neither solution is satisfactory. Each results in a boundary that differs from the true mean high tide line most of the time. Adopting either rule shifts boundary lines in such a way that public and private landowners may be deprived of valuable rights at various times of the year. We question whether we have the authority to affect such rights by judicial fiat even if we were inclined to do so." Pet. App. A, pp. 18-19.

The court instead accepted the State's alternate argument, the one that is most consistent with the previously cited California Supreme Court precedent that tidal boundaries fluctuate with erosion and accretion. That is, the littoral boundary along a sandy beach fluctuates as the mean high tide line fluctuates.

The court specifically rejected Sandyland's argument on four grounds: (1) even if it were practically possible to ascertain an "average" shore profile and so fix an "average" mean high tide line, such a boundary would differ from the true mean high tide line most of the time; (2) such a fixed line would deprive both private landowners and the public of valuable property rights at various times of the year; (3) under the solution speculated upon hopefully in *Kent*, it would be possible to fix the line only in the very limited hypothetical situation where the sand movement was substantially identical each year because substantial variation would mean a constantly changing "average" location for the line; (4) a fixed average position would be unworkable in the situation of a beach undergoing long-term erosion because, unless the "average" line was constantly relocated landward, the fixed line would result in private ownership of land that is permanently under ocean waters. Pet. App. A, pp. 19-20.

The Court of Appeal's decision on this point was well-reasoned and well within the bounds of available

California precedent. Contrary to petitioners' contention, Pet., pp. i-ii, there was no "sudden change in state law, unpredictable in terms of relevant precedents."

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1261

In The

# Supreme Court of the United States

October Term, 1992

GARY ANTOINE, et al.,

*Petitioners,*

v.

CALIFORNIA COASTAL COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Six**

## PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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## PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

### I. RESPONDENT'S ARGUMENTS THAT NO JURISDICTION EXISTS ARE MISLEADING AND WITHOUT MERIT

#### A. Jurisdiction Exists Under 28 U.S.C. § 1257

Respondent argues that there is not jurisdiction under 28 U.S.C. § 1257 because the issue of the tidal boundary and its relation to petitioners' seawall has been remanded for further proceedings before the Coastal Commission.

Respondent conveniently ignores the Court of Appeal's directions that (1) the burden of proof is on

petitioners as to all issues, (2) petitioners must establish that their seawall is located on private property at all times in relation to a "continuously moving" tidal boundary as the beach profile undergoes seasonal variation *or the walkway and lateral access easement conditions are valid*, and (3) the standard of review of any decision of the Coastal Commission following remand is the substantial evidence rule. See summary of Court of Appeal decision at pages 14-15 of Petition for Writ of Certiorari ("Petition"), and Court of Appeal opinion in Appendix A to the Petition.

The difficulty with respondent's argument is that there is a final decision of the California courts *in this action*. If this Court does not grant the Petition, then, following further administrative proceedings, all of the questions presented in the Petition will again be raised by petitioners in further litigation. In general, in California, under the doctrine of the "law of the case," any ruling in an appellate court opinion that is "necessary" to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on a later appeal. *Clemente v. State of Calif.*, 40 Cal. 3d 202, 211-212, 219 Cal. Rptr. 445 (1985). The same limitation ordinarily binds the California Supreme Court when it considers a second appeal after a decision has been rendered by a court of appeal:

> "Where a decision upon appeal has been rendered by a District Court of Appeal and the case is returned upon a reversal, and a second appeal comes to [the California Supreme Court] . . . , the [California Supreme Court] generally will

> not inquire into the merits of said first decision, but will regard it as the law of the case."
>
> *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 434, 212 Cal. Rptr. 466 (1985).

This is particularly troubling in light of the California Supreme Court's denial of review in this case, combined with its order directing depublication of the Court of Appeal's opinion in this case (see Appendix C to Petition). In California, many legal commentators and at least some Court of Appeal justices interpret a denial of review accompanied by the California Supreme Court's depublication order as the California Supreme Court's disapproval of at least some aspect of the Court of Appeal opinion. *See, e.g., People v. Dee*, 222 Cal. App. 3d 760, 763-765, 272 Cal. Rptr. 208 (1990). *Cf. California Rules of Court*, Rule 28, Advisory Commission Comment ["a denial of review will not be an expression of the opinion of the California Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion"] and Rule 979 ["An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision"].

In these circumstances, respondents' citation of *Laclede Gas Co. v. Public Service Commission*, 304 U.S. 398 (1938), and *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69-72 (1948), are not dispositive. These cases involved constitutional challenges based on quite different facts than those present in this case, and these and many other cases of this Court make clear that the determination whether there is a final judgment under 28 U.S.C. § 1257

is a question to be answered on a case by case basis with reference to the practical effect of the state court judgment.

There is jurisdiction under 28 U.S.C. § 1257 because either (i) the final judgment of the California courts in this case is a final judgment for the purposes of Section 1257 or (ii) if the final judgment of the California courts is an interlocutory judgment as respondent asserts, then exceptions in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485 (1975) are applicable.

"[A]s the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Id.* at 477. This Court has recognized at least four categories of cases in which the state court decision has been "treated as a final judgment for the purposes of 28 U.S.C. § 1257" and this Court has taken jurisdiction without awaiting the completion of the additional proceedings, in order to avoid " 'the mischief of economic waste and of delayed justice.' " *Id.* at 478 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124).

"In the first category of cases are those cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained" and, therefore, "the judgment of the state court on the federal issue is deemed final." *Cox, supra*, at 479. For the reasons discussed in the Petition and above, this is such a case. Without question, the federal issues have been adjudicated and petitioners

and this Court have every reason to believe that the Court of Appeal's directions and the respondent's consistent assertions and positions throughout this entire matter preordain the outcome of further proceedings. Petitioners' seawall will be subject to a walkway condition and lateral access easement.

As well, "there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review [in this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. . . . *Id.* at 482-483. To the extent that the result on remand is not preordained to be a finding against petitioners as to the location of the tidal boundary, with a walkway condition and lateral access easement as mentioned above, this case would fall into the category of cases defined by the above-described situation.

Contrary to the Commission's assertions, there is jurisdiction under 28 U.S.C. § 1257.

### B. All Questions Were Timely and Properly Raised Below

Respondent argues that petitioners failed to timely and properly raise Questions 2, 3 and 4. These very specific questions are fairly included in the questions and issues consistently raised by petitioners before the Commission in the administrative proceedings and throughout the court proceedings. See Statement of the Case in the Petition, at pages 3-17, and citations to record therein.

Petitioners set forth in detail in their Petition how and when the issues were raised.

### C. Questions 4 and 5 Are Not Solely Questions of State Law

Respondent argues that Question 4 (whether the applicant or State has the burden of proof as to walkway and lateral access conditions) and Question 5 (whether unconstitutional conditions should be stricken from a permit) are not federal questions. Respondent is wrong. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). See also Petition at 26-29.

## II. RESPONDENT'S ARGUMENTS DEMONSTRATE WHY THE ISSUES IN THIS CASE MERIT REVIEW BY THIS COURT

### A. The Nexus Requirement of *Nollan* Requires Greater Judicial Scrutiny Than That Afforded by the Traditional Standard of Review Used by the Court of Appeal

Petitioners note that the Court of Appeal's opinion in *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986), closely knit together the rationale for applying the substantial evidence rule in reviewing administrative proceedings and for not requiring any nexus between the impacts of the Nollans' home and the lateral access easement imposed by the Coastal Commission. Similar discussions of these issues appear in *Whaler's Village Club v. California Coastal Commission*, 173 Cal. App. 240, 218 Cal. Rptr. 122 (1985) and *Paoli v. California Coastal Commission*, 178 Cal. App. 3d 544, 223 Cal. Rptr. 792 (1986), which were implicitly overruled by

this Court in *Nollan* but are cited by respondent in support of the traditional, very deferential standard of review used by the Court of Appeal in this case. Respondent's Brief in Opposition, at 12.

Respondent's entire discussion of this issue demonstrates why this issue merits review by this Court – quite clearly, respondent wishes to avoid the effect of this Court's decision in *Nollan* adverse to respondent.

As discussed in the Petition, the Court of Appeal's use of the substantial evidence rule conflicts with this Court's *Nollan* decision and with other state court decisions following *Nollan*. As was also discussed in the Petition, the lower courts must apply the correct degree of scrutiny if they are to properly conduct a takings analysis under *Nollan*. The level of judicial scrutiny is the key factor in determining whether the Takings Clause provides protection to property owners from government exaction schemes.

The Court in *Nollan* characterized the Commission's abuse of its permitting authority as extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. How are courts to ferret out such abuses of the permitting authority if they do not look closely at the findings *and* evidence underlying the governmental action? The present case, like *Nollan*, illustrates the need for heightened judicial scrutiny. Resolving the issue of the appropriate degree of scrutiny under the Takings Clause, created by the Court of Appeal's decision in this case, merits review by this Court.

### B. Respondent's Arguments Concerning Tidal Boundaries Misstate the Holding of *People v. William Kent Estate*

Respondent acknowledges that the only reported California case concerning the public-private boundary along a sandy beach subject to seasonal variation is *People v. William Kent Estate*, 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1964), but argue that it did not definitively resolve the issue of how the tidal boundary is to be located on a sandy beach. Petitioners disagree. In *Kent Estate*, the Court of Appeal reversed a trial court judgment granting an injunction requested by the State of California prohibiting defendant's interference with public access along a sandy beach below the ordinary high water mark. The injunction did not fix the location of this public-private boundary line. The State asserted that the ordinary high water mark was a constantly moving line, which shifted landward and seaward as the beach varied in width from summer to winter. Defendant had constructed a fence along the beach. The Court of Appeal stated that the evidence did not support a finding that the boundary was constantly migrating landward and seaward, "thus constantly transferring ownership of the intermediate land." *Id.* at 160. The *Kent Estate* Court of Appeal stated:

> "The evidence here is that the beach is some 80 feet wider in summer than in winter. If these changes be constant, in offsetting pairs occurring annually, they can hardly be gradual and imperceptible, and thus cannot meet the definitions of natural accretion and deliction. No effort was made by the parties to determine whether these movements are of substantially the same distance each year, thus affording a

> basis for fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line. This effort should be made upon retrial. We recognize that the 'almost mathematical line bounding Blackacre' (Rest., Torts, § 943, p. 724) cannot be achieved, but somewhat greater certainty should be possible than the constantly moving line contemplated by the present decree. If not, the trial court should consider whether the uncertainty is so great as to warrant denial of injunctive relief (Rest., Torts, § 943; 27 Cal.Jur.2d 162)." *Id.* at 160-161.

Thus, *Kent Estate* establishes the rule that an average beach position be used to fix the location of the ordinary high water mark on a sandy beach along the California coast subject to seasonal variation in width. A continuously moving boundary line was rejected as the basis for the State to enforce public access along the beach.

In adopting a continuously moving line as the basis for fixing the location of the ordinary high water mark along petitioners' sandy beach subject to seasonal variation, the Court of Appeal made a "sudden change in state law, unpredictable in terms of relevant precedents" and thereby effected a taking, just as Justice Stewart warned against. See *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring).

## III. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, petitioners respectfully request that the Court grant this Petition for Writ of Certiorari.

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Respectfully submitted,

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